IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1207

BARBARA B. BLUM, as Acting Commissioner, New York State Department of Social Services and GABRIEL T. RUSSO, Commissioner, Monroe County, Department of Social Services,

Petitioners,

against

MARTIN TOOMEY and MARY TOOMEY, individually and on behalf of their minor children, and on behalf of a class of all other persons similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

CASES

STATUTES

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners,* the Commissioners of the New York State and Monroe County Departments of Social Services respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered on November 28, 1977.

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* The original named petitioners in this case were William Greklek, Theresa Greklek, Martin Toomey and Mary Toomey. Philip L. Toia was Commissioner of New York State Department of Social Services. Barbara B. Blum is now the Acting Commissioner. The Grekleks have since become "categorical recipients" and thus have dropped from this class along with the Albany County Commissioner of Social Services.

Opinions Below

The *per curiam* opinion (*Greklek* v. *Toia*) of the Court of Appeals affirmed the decision of the District Court for the Southern District of New York and is reported at 565 F2d 1259. The opinion of the Court of Appeals is appended a page 1a. The judgment of the District Court is appended at p. 7a. The Order Correcting the Order of the District Court is appended at p. 11a. The decisions of the District Court rendered from the bench denying petitioner's motion to dismiss and granting the judgment for respondents are reproduced at pages 13a and 17a, respectively.

Jurisdiction

The judgment of the Court of Appeals was rendered and entered on November 28, 1977. The jurisdiction of this Court to review the case on petition for certiorari rests on 28 U.S.C. § 1254(1).

Questions Presented

1. Did the District Court have jurisdiction over a pendent claim where there was not $10,000 in controversy between any plaintiff and the defendants and where the Constitutional claim is insubstantial and in conflict with consistent and explicit pronouncements by this Court?

The Courts below answerd "yes". Petitioners contend that the answer should be "no".

2. Does the exclusion of a fixed amount of money for work related expenses violate Federal law requiring that reasonable amount of income be exempted?

The Courts below answered "yes". Petitioners contend that the answer should be "no".

Statutes and Regulations Construed

The relevant statutes and regulations appear in the Appendix "G" at page 40a *et seq.*

Statement of the Case

Petitioners seek review of a judgment of the Court of Appeals for the Second Circuit which affirmed a judgment of the District Court for the Northern District of New York (Hon. Edmund Port, J.) entered September 30, 1977, holding that Section 366.2 of New York Social Services Law and related regulation 18 NYCRR § 360.5(a) to be in conflict with Federal law and regulations, and granting injunctive and other relief. Petitioners seek review of this particular issue due to its importance which transcends the particular facts of this case.

The facts of this case are not in dispute.

Undisputed Facts

Respondents are "medically indigent" recipients of medicaid pursuant to Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* Suing as a class, they sought a judgment declaring that New York Social Services Law § 366(2) and its implementing regulation, 18 NYCRR § 360.5(a), denied respondents the equal protection of the laws and was in violation of the Social Security Act and its regulations, 42 U.S.C. § 1396(a)(10)(c)(i) and (17)(B); 42 U.S.C. § 1396a(a)(10)(c)(i) and (17)(B); 45 C.F.R. § 248.3(b)(i); (c)(l)(i), (ii)(A); (c)(2), (3)(i); 233.20(a)(3)(iv); (7), and enjoining its enforcement.

The State statute and regulations provide that "medically needy" medicare recipients, i.e. the persons in need of assistance only because of the extent of their medical expenses may deduct a flat amount for work related ex-

penses. Recipients of AFDC, on the other hand, may deduct actual expenses. 18 NYCRR 352.14. Respondents claimed that such a distinction violated the equal protection clause of the Fourteenth Amendment as well as the aforesaid "comparability" provisions of Federal law and regulations. The result, the respondents alleged, was to require the "medically needy" to spend more of their own money for medical care.

The State and local Social Services Commissioners contended that the statutes and regulations are neither in violation of Federal law nor are they unconstitutional.

The District Court held the claim of unconstitutionality sufficient to raise a "substantial constitutional question." Considering the merits of respondents' pendent claim, the District Court held that the state statute violated Federal law and regulations.

An appeal was taken to the Court of Appeals for the Second Circuit which affirmed the judgment of the District Court on November 28, 1977. It also stayed its mandate, *sua sponte,* for two weeks to permit filing of an application to this Court for a further stay. The petitioners' application for a stay was denied on December 12, 1977 by Mr. Justice Powell.

Reasons For Granting Certiorari

I.

The decision below, in finding a substantial claim of denial of equal protection arising out of a difference in terms or assistance grants for different categories of recipients, conflicts with established precedents in this Court.

In sustaining the jurisdiction of the District Court, the Court of Appeals determined an important question of Federal law contrary to the applicable decisions of this Court.

In *Hagans* v. *Lavine,* 415 U.S. 528, 543-550 (1974) this Court held that (1) in the absence of a substantial constitutional question and (2) in the absence of more than $10,000 in controversy, a District Court could not consider a "Supremacy Clause" claim that a State welfare statute or regulation conflicted with a provision of the Federal Social Security Act and regulations. Thus, this Court left the determination of such claims to the State courts of competent jurisdiction, which in fact, adjudicate these controversies, *Lee* v. *Smith,* —— N Y 2d—— (N.Y. Ct. of App. #578, 12/21/77); *Tucker* v. *Toia,* 43 N Y 2d 1 (1977); *Matter of Dumbleton* v. *Reed,* 40 N Y 2d 586, 357 N.E. 2d 363; 388 N.Y.S. 2d 893 (1976).

In determining the existence of a substantial equal protection claim, this Court has consistently upheld statutory classifications that are rational, and free from invidious discrimination, even if such classifications are not made with "mathematical nicety" or, if, in practice they result in inequality, *Maher* v. *Roe,* 431 U.S. ——, 97 S. Ct. 2376-2381 (1977); *Hagans* v. *Lavine, supra,* 415 U.S. at 539; *Richardson* v. *Belcher,* 404 U.S. 78, 81 (1971); *Dandrige* v. *Williams,* 397 U.S. 471, 485-487 (1970).

Different levels of assistance to different categories of recipients were upheld in *Jefferson* v. *Hackney,* 406 U.S. 535 (1972) in which this Court upheld higher levels of assistance for the aged than for blind, disabled or AFDC recipients.

The AFDC family's eligibility is determined by a social worker responsible for the welfare of the dependent children (e.g. *Wyman* v. *James,* 400 U.S. 309 [1971]) and which keeps such a person regularly informed of the details necessary to determine individual expenses.

By definition, the "medically needy" have higher incomes than the "categorically needy". Therefore even if the Court of Appeals had determined that the fixed exemption was lower than the individualized ones such a difference

would not present a substantial equal protection claim. In that case, those with relatively greater economic means would absorb more of the cost of their health care than those on full public assistance, *Maher* v. *Roe, supra,* 97 S. Ct. at 2381-2383; *Dandridge* v. *Williams, supra.*

In fact the medically needy may be better off, since they receive a flat amount for work expenses irrespective of the actual expenses and the necessity of proof. Such a flat grant gives more dignity to the recipient (See *Rosado* v. *Wyman,* 397 U.S. 397 [1970]) which is especially important to recipients who have been independent and self-supporting until catastrophic medical needs arose.

In *Maher* v. *Roe,* this Court was confronted with two classes of women; equally poor, equally pregnant, equally desirous of aborting. Yet they held that the State could determine its financial priorities and deny Medicaid assistance to women seeking "elective" first trimester abortions without violating the equal protection of the laws, *id.* 45 U.S.L.W. at 4791 et seq.; see also *Dandridge* v. *Williams,* 397 U.S. 471 (1970).

The *Maher* decision makes it clear, once more, that the United States District Courts are not in the business of hearing pendent jurisdiction claims of alleged violations of the Social Security Act and regulations based upon a complaint that a state should have parcelled out its welfare funds in a different way. To be sure, persons in plaintiffs' situation are not without a remedy. However this remedy must be pursued in the State courts, which have shown themselves fully prepared to hear and determine these statutory claims. *Tucker* v. *Toia,* 43 N Y 2d 1 (1977); *Lee* v. *Smith,* —— N Y 2d —— (N.Y. Ct. of App. #578 December 21 1977).

II.

No plaintiff had $10,000 in controversy with the defendants.

There has never been a claim that the difference in the manner in which work related expenses are deducted results, in any given case, is a difference in the amount of medical assistance of more than $10,000 as to any single recipient. Consequently, pending jurisdiction, over the substantive issues was absent and the matter should have been left to the State courts. See *Hagans* v. *Lavine, supra,* 415 U.S. at 536.

The decisions below represent a serious trespass by the lower Federal courts upon the legitimate rights of the States. Intervention of this Court is necessary to curb this improper exercise of federal judicial power.

III.

The State Legislature determined a reasonable fixed amount of income to be exempted for work-related expenses which conforms with Federal law.

Petitioners contend that this Court ought not to determine whether a conflict exists between the State exemption of a fixed amount for work related expenses (New York Social Services Law § 366) and the Federal law requiring exemption of a reasonable amount of income (e.g. 45 C.F.R. § 233.20[a][3][iv]). Petitioners do contend, though, that the decision on the merits was erroneous and that were the issue presented in a proper forum it would have been decided differently. But if this Court were to hold that jurisdiction properly lay in the District Court, it should grant certiorari to consider the question whether it is reasonable to exempt a fixed amount of work expenses for persons receiving medical assistance only, rather than attempting to determine administratively the precise amounts

reasonably attributable to work related expenses for each individual.

New York Social Services Law § 366 reflects a reasonable legislative interpretation of the requirements of Federal law regarding income "disregards" of Medicaid recipients.

In addition to such items as income taxes [§ 366(2)(a)(5)2], the statute exempts

> "income in such amounts as may be established by rules of the board which minimum income exemptions shall make allowance for the number of wage earners in a household and the number of family members in a household dependent on such wage earners [§ 366(a)(a)(8)]".

Pursuant to that provision, the Board of Social Welfare on May 6, 1966, amended 18 NYCRR § 85.3 to set forth the minimum exempt amounts for each family size with two, one or no wage-earners. The rule establishes that for each family size, the income exemption rises as the number of wage earners increases. This allows for greater work-related expenses (transportation, child care, lunches and similar items) when there are more wage-earners in the household. Work-related expenses were, thus, exempted under these provisions, in the form of fixed substantial exempt amounts determined by the Legislature to take into consideration the actual work-related expenses of "medically needy" applicants.

The Medical Assistance Schedule was intended to simplify the processing of applications by amalgamating reasonable deductions and expenditures such as work-related expenses into one large, flat exemption varying with the size of the household. In addition, the statutory exceptions of income taxes, court ordered support payments, and health insurance preimums addition, were to be separately

excluded. Since 1966, the income exemption schedule under § 366(2)(a) has increased even further. (See Ch. 151, L. 1973). Such a procedure is more just in that every person is fairly apprised of the exemption he is allowed, and all applicants are treated equally. Furthermore, a fixed amount accords the recipient more dignity and privacy since he need not prove his individual working and living habits, such proof is required, in any event, from the categorically needy. Thus, far from contradicting the substance of the federal regulations as contended by plaintiffs, the state statute had provided for such work-related disregards by incorporation into a large flat exemption.

Since the Legislature made findings that these flat amounts represented income reasonably attributable to work-related expenses it does not conflict with 45 C.F.R. § 233.20(a)(3)(IV), which provides that "income equal to expenses reasonably attributable to the earning of income" be disregarded; 45 C.F.R. § 233.20(a)(7), which provides that all work expenses, "personal and nonpersonal" will be disregarded; and 45 C.F.R. § 248.3(c)(3)(i), which provides that the State medicaid plan must provide for "consideration of all disregards . . . which are utilized in determining eligibility . . . under the State's approved title IV-A [AFDC] plan."

The Federal regulations (42 U.S.C. § 1396[a][17]) allow the States to formulate their own eligibility standards so long as they are reasonable. The Court below relied on 42 U.S.C. § 1396(a)(10)(c)(i), but that requires that the determination of the person's income to pay for medical care must be made in accordance with standards comparable but not identical, to those used in determining AFDC eligibility or needs.

In *Rosado* v. *Wyman,* 397 U.S. 397, 417-20 (1970), this Court specifically held that individualized standards of assistance could be converted to flat or fixed standards

of assistance without lowering the amounts in that standard, even if certain individuals might actually have lower needs identified. Also see *Rosado* v. *Wyman,* 322 F. Supp. 1173, 1178 (E.D.N.Y. 1970), affd. 43 F. 2d 619 (2d Cir. 1971), affd. 402 U.S. 991. Therefore, HEW's requirement of comparability must countenance a different method of computation of work-related allowances for different categories of recipients, particularly when those two methods were the ones which this Court has held are comparable.

Since the Courts below were required to determine whether the State Legislature had exempted fixed amounts for the "medically needy" which were comparable to the individualized amounts exempted for AFDC recipients, it would be more appropriate for that decision to be made by a State court interpreting the Legislature's constitutional responsibility (N.Y. State Const. Art. XVII) as well as Federal law, unless federal jurisdiction is mandatory. Here federal jurisdiction was improperly found and had the case been tried in the correct State forum it might have made a contrary ruling.

CONCLUSION

Certiorari to the United States Court of Appeals should be granted.

Dated: New York, New York
February 24, 1978

Respectfully submitted,

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APPENDIX "A"

Opinion.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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77 Civ. 7558-7559

WILLIAM GREKLEK, et al.,
Plaintiffs-Appellees,
—against—
PHILIP L. TOIA, et al.,
Defendants-Appellants.

Before:

FEINBERG, MANSFIELD, VAN GRAAFEILAND,
Circuit Judges.

Appeal from decision of the United States District Court for the Northern District of New York, Edmund Port, *J.*, holding that section of New York Social Services Law and related regulation conflict with federal law and regulations, and granting injunctive and other relief.

Affirmed.

ROBERT S. HAMMER, New York, N. Y., Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, Irving Galt, Assistant Attorney General, Gale D. Berg, Special Deputy Assistant

Appendix "A"

Attorney General, of counsel), *for the State Defendants-Appellants.*

RENE H. REIXACH, Rochester, N. Y., Attorney, Greater Up-State Law Project, *for the Plaintiffs-Appellees.*

PER CURIAM:

Appellants, state and county officials of the Department of Social Services of the State of New York, appeal from a decision by the United States District Court for the Northern District of New York, Edmund Port, *J.*, enjoining them from continuing to deny the class of so-called "medically needy"[1] persons the same deductions for work expenses in calculating net income as are permitted to applicants for Aid to Families with Dependent Children (AFDC). The judge also held that this procedure violated the Social Security Act and relevant federal regulations, and required that plaintiff class members be notified of their right to a recomputation of medical benefits due. Because of the urgency of the matter, Judge Port dictated his opinion in open court, but stayed his order for a short period to allow a prompt appeal. We continued the stay and expedited the appeal. Because we conclude that ap-

[1] As defined in 42 C.F.R. § 448.1(a)(2)(i), "[a]n individual is considered to be medically needy if he has income and resources which exceed the amount of income and resources allowed to the categorically needy but which are insufficient to meet the costs of necessary medical and remedial care and services." The "categorically needy" are persons eligible for public assistance under the AFDC or Supplemental Security Income programs. Id. § 448.1(a)(1)(i). (These citations, and those to federal regulations elsewhere in this opinion, reflect a recent transfer of certain sections of 45 C.F.R. dealing with medical assistance programs to 42 C.F.R. See 42 Reg. 52826-27 1977)).

Appendix "A"

pellants' challenges to the decision of the district court have no merit, we affirm.[2]

Appellant argue first that the district court lacked jurisdiction because plaintiffs' statutory claims did not meet the $10,000 jurisdictional threshold of 28 U.S.C. § 1331 and pendent jurisdiction over these claims was not justified. The district court accepted pendent jurisdiction on the theory that plaintiffs also presented a constitutional claim substantial enough to confer jurisdiction. That constitutional question turned on whether New York's disparate treatment of two classes of potential Medicaid recipients violated the Equal Protection Clause of the Fourteenth Amendment. The State treats the members of the two classes differently in terms of the extent to which it disregards their work-related expenses in determining whether their available income is low enough to entitle them to medical assistance.[3]

We agree with the district court that this question was substantial enough to confer jurisdiction under the standard set forth in *Hagans* v. *Lavine*, 415 U.S. 528, 534-43 (1974). We have recently construed closely analogous claims as sufficient to vest jurisdiction under 28 U.S.C. § 1343(3). *Friedman* v. *Berger*, 547 F.2d 724, 727 n.6 (2d Cir. 1976), cert. denied, 97 S. Ct. 1681 (1977); *Aitchison*

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[2] Appellees' motion to dismiss the appeal of appellant Russo, Commissioner of the Monroe County Department of Social Services, is denied.

[3] New York deducts ("disregards") work-related expenses in computing the gross earnings of AFDC recipients for purposes of determining the amount of support to which they are entitled. 18 N.Y.C.R.R. 352.19(a). However, the "medically needy" are permitted no such deductions; for them, a schedule of "minimum exemptions" have been established. To become eligible for medical benefits, the "medically needy" must exhaust, on medical expenses, the difference between their net incomes and the applicable "exemption." The exemptions vary according to the size of a household. New York Social Services Law § 366.2(a)(8).

v. *Berger*, 404 F. Supp. 1137, 1142-43 (S.D.N.Y. 1975), aff'd, 538 F.2d 307 (2d Cir.), cert. denied, 429 U.S. 890 (1976). Cf. *Andrews* v. *Maher*, 525 F.2d 113, 116 (2d Cir. 1975). Appellants urge us to reexamine these holdings in light of the Supreme Court's determination in *Maher* v. *Roe*, 97 S. Ct. 2376 (1977), that the provision of Medicaid for childbirth but not for elective abortions is constitutionally permissible. However, the principal state interests invoked to sustain the Medicaid-related classification at issue in *Maher* are not relevant to the instant case. Appellees' constitutional claim clearly meets the liberal standard established in *Hagans* v. *Lavine*, supra, 415 U.S. at 539, since "we cannot say that the equal protection issue tendered by the complaint was either frivolous or so insubstantial as to be beyond the jurisdiction of the District Court." Therefore, the district court also had jurisdiction over plaintiffs' statutory or Supremacy Clause claims.

Appellants also assert that the district court improperly certified plaintiffs' class. We find no abuse of discretion, since only class certification could avert the substantial possibility of the litigation becoming moot prior to decision. That very development, we are told, prevented an earlier adjudication of the same issues involved here[4] from averting the necessity for this action.

Finally, appellants argue that the district court's decision was wrong on the merits, since the challenged state procedures are in fact not in conflict with federal law. We disagree, given the requirement of subsections (10)(C)(i) and (17)(B) of 42 U.S.C. § 1396a(a) that the "medically needy" be treated the same as AFDC applicants with respect to income disregarded for purposes of ascertaining eligibility. See also 42 C.F.R. § 448.3(c)(3)(i). The State concedes that it is currently applying different standards

[4] *Newborn* v. *Toia*, 391 N.Y.S.2d 786 (Sup. Ct. Kings Co. 1976).

to the two groups, allowing individual AFDC applicants to deduct all work-related expenses while remitting the medically needy to an inflexible schedule of "minimum exemptions."[5] The district court properly found this practice irreconcilable with the federal requirements.

Judgment affirmed. The mandate shall issue two weeks from today to allow appellants a further brief period in which to apply to the Supreme Court for a stay.

[5] See note 3 supra. Appellants argue, and appellees vigorously deny, that these exemptions have been adjusted upward to allow for retention of amounts sufficient to provide for work-related expenses. Appellees are buttressed by two letters from HEW administrators, which advised the State that its treatment of the "medically needy" did not comply with federal standards. In any event, we are satisfied that the State's use of a dual system to determine Medicaid eligibility violates the core statutory and regulatory requirement that the groups involved be treated the same in this respect.

APPENDIX "B"

Corrections to Opinion Ordered by United States Court of Appeals Second Circuit.

Greklek, et al v. Toia, et al — September Term 1977
Docket No. 77-7558, et al — Decided November 28, 1977

Page 535, line 3—delete "Appellant" and insert "Appellants" in place thereof.

Page 535, footnote 3, 9 lines up from bottom of page—delete "("disregards")".

Page 535, footnote 3, 5 lines up from bottom of page—delete "have" and insert "has" in place thereof.

A. Daniel Fusaro
Clerk

ADF/hd

APPENDIX "C"

Order and Judgment.

UNITED STATES DISTRICT COURT
Northern District of New York

77 Civ. 228

William Greklek, Theresa Greklek, Martin Toomey and Mary Toomey, individually and on behalf of their minor children, and on behalf of a class of all other persons similarly situated,

Plaintiffs,

vs.

Philip L. Toia, individually and as Commissioner of the New York State Department of Social Services, Carmen Shang, as Acting Commissioner of the New York State Department of Social Services, John Fahey, individually and as Commissioner of the Albany County Department of Social Services, Gabriel T. Russo, individually and as Commissioner of the Monroe County Department of Social Services,

Defendants.

Edmund Port, Judge

Order

Upon all the proceedings had herein, the court having this day dictated its findings of facts, conclusions of law and decision on the record, it is

Ordered, that this action is maintainable as a class action pursuant to Fed. R. Civ. P., Rules 23(a), and 23(b)(2).

Appendix "C"

The class consists of "medically needy" persons in the State of New York who will in the future apply for medical assistance to any office of the Department of Social Services or who have so applied since June 1, 1977; and it is further

ORDERED, that the plaintiffs' motion to certify a defendants' class be and the same hereby is denied; and it is further

ORDERED, ADJUDGED AND DECREED that the action be and the same hereby is dismissed as against the defendant John Fahey individually and as Commissioner of the Albany County Department of Social Services, as moot, without costs; and it is further

ORDERED, that the defendants' motions to dismiss are hereby denied in all respects except as hereinabove granted; and it is further

ORDERED, that plaintiffs' demands for damages and retroactive benefits be and the same hereby are denied; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants' policies, including the manner in which New York Social Services Law § 366.2 and 18 N.Y.C.R.R. 360.5(a) as applied, are illegal in that they conflict with the Social Security Act and regulations issued thereunder insofar as they do not provide the same disregards or deductions from gross income of all work-related expenses for medically needy as are used to determine eligibility for or the amount of said benefits for AFDC; and it is further

ORDERED, ADJUDGED AND DECREED that the defendant Shang, his successor in office be and they hereby are

Appendix "C"

directed to apply the same disregards or deductions for work-related expenses to the medically needy as are applied to AFDC recipients of medical assistance; and it is further

ORDERED, that the defendant Shang, his successors in office be and they hereby are directed to give notice or cause the appropriate local Departments of Social Services to give notice in writing to all members of the class within 30 days of the date of this judgment, that upon request the amount of medical assistance to which said class member is entitled will be recomputed, disregarding the work-related expenses. Said notice shall contain a statement that request must be made within 45 days from the date of this notice, and must further state the other necessary and reasonable requirements for determining eligibility; and it is further

ORDERED, that the recomputation to be made herein and the determination of any applications for medical assistance made hereafter shall be computed or recomputed in accordance with this judgment for any period subsequent to June 1, 1977; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiffs have judgment for attorneys' fees in the amount of $....., as fixed by the court, against the defendants Philip L. Toia and Carmen Shang as Commissioner of New York State Department of Social Services and as Acting Commissioner of New York State Department of Social Services, respectively; and it is further

ORDERED, that this judgment shall be stayed for a period of 15 days and in the event a notice of appeal is duly filed within said period, the stay is continued pending determination of said appeal in the Court of Appeals. The stay

Appendix "C"

granted herein, however, shall in no way affect the computation or recomputation of benefits to the class; and it is further

ORDERED, that the temporary restraining order granted to the named plaintiffs Toomeys be and it hereby is continued pending the disposition of any appeal herein.

EDMUND PORT
Senior U.S. District Judge

Dated: Auburn, New York
September 30, 1977

APPENDIX "D"

Order Correcting Order of September 30, 1977.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

77 Civ. 228

WILLIAM GREKLEK, THERESA GREKLEK, MARTIN TOOMEY AND MARY TOOMEY, individually and on behalf of their minor children, and on behalf of a class of all other persons similarly situated,

Plaintiffs,

vs.

PHILIP L. TOIA, individually and as Commissioner of the New York State Department of Social Services, CARMEN SHANG, as Acting Commissioner of the New York State Department of Social Services, JOHN FAHEY, individually and as Commissioner of the Albany County Department of Social Services, GABRIEL T. RUSSO, individually and as Commissioner of the Monroe County Department of Social Services,

Defendants.

The court dictated a description of the persons comprising the class in the above captioned action on the record. However, the court ambiguously described the class in the written order dated September 30, 1977. Accordingly, it is

ORDERED sua sponte that the first ordering paragraph of the Order dated September 30, 1977 be and it hereby is amended and corrected as follows:

Appendix "D"

By inserting between the words "applied" and "since" in the last line of said paragraph the following: "for, or are presently or have been in receipt of medical assistance".

EDMUND PORT
Senior U.S. District Judge

Dated: October 6th, 1977
Auburn, New York

APPENDIX "E"

Decision Denying Dismissal.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

77 Civ. 228

WILLIAM GREKLEK, ET AL.,
Plaintiffs,

—VS—

PHILIP L. TOIA, Individually and as Commissioner of the New York State Department of Social Services, et al,
Defendants.

Excerpts of proceedings held at United States District Court, Auburn, New York, on August 4, 1977, the Honorable Edmund Port, presiding.

For the Plaintiffs:	MONROE COUNTY LEGAL ASSISTANCE CORP. BY: RENE H. REIXACH, ESQ. LOUIS J. LEFKOWITZ, ESQ.
For the Defendant, Commissioner of the New York State Department of Social Services:	Attorney General of the State of New York BY: ANNE S. MEADVIN, ESQ. Assistant Attorney General
For the Defendant, Monroe County Social Services Department:	MONROE COUNTY SOCIAL SERVICES DEPARTMENT BY: SAM DILALLA, ESQ., of Counsel
For the Defendant, Albany County Department of Social Services:	ALBANY COUNTY DEPARTMENT OF SOCIAL SERVICES BY: DAVID A. DIETRICH, ESQ.

Appendix "E"

The Court: I think it would probably serve to make the disposition more orderly if I were to rule on the defendants' motion, and I will treat the motion of the defendant Toia as being the motion of all defendants so that the ruling and the argument applies to all defendants.

The motion to dismiss for lack of jurisdiction is denied.

I think, during the course of the argument, I made, by my questioning and statements, made it clear that I felt that there was a colorable constitutional question presented. That is the kind of a question that would afford the Court jurisdiction under Goosbie, and I'm sorry, but because I'm talking from memory and not from a brief I can't afford you with the citations, but the cases, if I refer to them, are sufficiently well known so that the citations can be obtained by counsel readily.

Certainly the claim made here, in my view, is not foreclosed by any prior decisions of the Supreme Court.

The Supreme Court has considered the cases of similar ilk, nor can it be considered as frivolous on its face.

Insofar as exhaustion is concerned, I don't think that the matter has been definitively determined. In that Van Lare case I went into the question of exhaustion of administrative remedies at some length. I believe I concluded, even at that time, that it was substantially an open question, although in this circuit, even assuming that the rule is that it needs to be exhausted, the lead—the old lead case of Eisen v. Eastman exempted from the operation of that rule situations where it would be an exercise in futility.

I think this is clearly such a case. The Commissioner has had this called to his attention by the HEW, at least they've claimed that this is a violation.

Now, when they assert a violation and the Commissioner pays no attention to it, as he did for a year, he ignored their report for a year, if my recollection of the structure

Appendix "E"

of the Social Security Act is correct, he's running the risk that the Secretary of Health, Education and Welfare could bring some kind of a proceeding to cut the State of New York off of Federal reimbursement.

Now, he certainly, if he's running that kind of a risk, he's made a definite determination, he's made the kind of determination that you wouldn't expect, nor have reason to believe, if you were an individual claimant, would have the force to change.

I think he's directly stated his position. His position is that the plaintiffs are not entitled to what they claim. Now, he didn't leave any opening to be persuaded otherwise. He made it pretty clear. I think that I would have to be blind to say that the administrative remedy would be of value under these circumstances.

This appears to be the only other argument of substance that was addressed to the dismissal for lack of jurisdiction. I don't think this is an appropriate case to abstain. Ordinarily abstention is used, now I'm not certain of my grounds, but I think it's the Pullman case that deals with abstention and then there's a Great Lake or something case, but it's ordinarily the Court abstains where the construction of a state statute is at issue and the state Courts could construe that statute constitutionally or could avoid the constitutional question by a construction of the statute. This is not that kind of a case. So that now I suppose there are no other—now we move to the plaintiffs—to the show cause order itself.

(After some colloquy.)

The Court: Now I'm going to ask the plaintiff's attorney to prepare a separate order with reference to the order to dismiss. It doesn't require, if you observe the rules, all of the recitations of all the prior proceedings. It requires only a simple statement that the motion was heard. I do want a statement incorporated that my decision was

dictated on the record and the motion is denied, in all respects.

Mr. Reixach: Your Honor, should that motion also reflect that the motion was applied, treated also for the defendant Fahey?

The Court: All defendants. The defendants have moved jointly. The motion has been denied. The purpose of that, I don't want to foreclose any defendant from questioning on appeal the ruling.

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I, Mark Dennis, a Court Reporter, hereby certify that I attended the foregoing proceeding and took stenographic notes of the same; that the foregoing is a true and correct transcript of such proceeding and the excerpts thereof, transcribed from my stenographic notes to the best of my ability.

MARK DENNIS
MARK DENNIS

APPENDIX "F"

Opinion, September 30, 1977.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

77 Civ. 228

WILLIAM GREKLEK, et al

—VS—

PHILIP L. TOIA, Individually and as the Commissioner of the New York State Department of Social Services, et al,

Defendant

DECISION in the above case by the HONORABLE EDMUND PORT, in the Federal Bldg. on September 30, 1977 in Auburn, New York.

For the Plaintiff: MONROE COUNTY LEGAL ASSISTANCE CORP. By: Renè H. Reixach, Jr., Esq.

For the Defendant (Toia): LOUIS J. LEFKOWITZ, Attorney General By: Anne Meadvin, Esq., Deputy Asst. Attorney General

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The Court Clerk: William Greklek, et al vs. Philip L. Toia. Case Number 77 CV—228.

The Court: Note that Mr. Reixach representing Plaintiffs is present; Mrs. Meadvin representing the State Commissioner is present and I assume by consent of other Defendants you're representing them at this time as well, is that correct?

Mrs. Meadvin: I think so, your Honor.

The Court: Okay. Mr. Reixach and Mrs. Meadvin, since we recessed yesterday I've had an opportunity to review the material that was submitted to me and to organize my thoughts and to determine the factual and legal issues. I must apologize for requiring you to come back today but by doing that I'm certain you are serving the interest of your clients because the disposition of the matter is greatly expedited as I explained earlier by this method rather than taking it under consideration, writing an Opinion.

Fortunately there were few if any controverted facts. The facts were largely without dispute. The case was submitted on a moral stipulation placed on the record as to some facts and with stipulation of Counsel that the Court consider all the pleadings, exhibits, the affidavits and the other material that previously had been supplied to me. On motion of the Plaintiff and consent of the Defendants Carmen Shang, as Acting Commissioner of New York State Department of Social Services was as a party Defendant. It was also stipulated that the—at least the numerosity element required for class action of this was present. The other necessary elements to constitute a class were not disputed. The action was initially brought by William and Theresa Greklek and Martin and Mary Toomey individually and on behalf of their minor children and on behalf of class similarly situated.

The action sought injunctive relief and the formation of —and certification of the class. The first contact with the case was on an application for Temporary Restraining Order. Relief was granted to the named Plaintiffs on consent of the parties and the question of class and the merits were deferred. Motions were heard concerning jurisdiction, that is motions to dismiss on the basis of lack of jurisdiction and were denied by me with a discussion on

the record. The case involves people known as medically needy. I think while I'm clearly over-simplifying the scheme of things, that the general philosophy behind the law that we're dealing with is that there are persons who need assistance to live, financial assistance. There are various classes of them recognized by the Social Security Law and various laws to provide benefits for those people such as Aid To Home Families For Dependent Children, disabled, Social and Supplemental Security Income people and that variety of people that need help.

Those persons that get financial assistance in order to live are automatically entitled to benefits known as Medical Assistance or commonly referred to as Medicaid. Medicaid is a procedure by which persons who are not indigent in the sense that they can't take care of their sustenance needs but are indigent in the sense that they are—after taking care of their basic needs they have insufficient funds to provide for their medical needs are considered as medically needy.

So we have two classes of people that are dealt with in receiving medical assistance under the so-called Title XIX of Medicaid Law. There are the categorically needy, people that are receiving financial aid for sustenance, and the medically needy. The second class of people who become poor or indigent or needy only in reference to these medical expenses. It's with this second class of people that we're dealing in this case.

Greklek, Plaintiff Greklek moved from the second class into the first class. He became a categorically needy person thereby entitling him automatically to Medicaid benefits or medical assistance as a result of which Plaintiff's Counsel advised the Court insofar as at least injunctive relief was concerned that Plaintiff—the case was mooted.

The Plaintiff Toomey is a person whose wife, Mrs. Toomey, has multiple sclerosis as a result of which of

course they're subjected to substantial medical bills. These medical bills are so large that he's unable to cope with them out of his own income, although his income exceeds that which would make him a categorically needy person or categorically needy family.

In order to adjust so that one is treated substantially the same as the other the working person or the medically needy person has a base amount fixed by the statute in New York which is determined to be the amount that he needs to live. If he never had a dime in medical expenses, that amount is fixed by statute depending on the size of family and number of persons and so forth. That amount under the Social Security Act must be at least at the sustenance level of a similarly situated categorically needy family.

The problem arises here because the Plaintiff's contend—or wait, I'd better back up a minute. Before a medically needy person gets medical assistance he must use up or as the more—people more familiar with the system say, he must spend down his income to the level fixed by statute which is as I said at least in the amount of sustenance for the categorically needy. Now, if in determining his rate or put it the other way, before he has to spend down, he's given credit for work-related expenses, of course there is that much more that he will be reimbursed toward his medical expenses. In other words, the categorically needy, the AFDC fellow, they say that—now before—we're only going to deal with you on the basis of reality, what you in fact have. If you have to buy tools, if you have to spend money for car fare to get to your job or bus fare, transportation, you don't have it. So we're going to—not going to treat that as money that you have. Consequently you'll get greater benefits.

The medically needy fellow, the State has said to, oh, no, that's part of your income. Of course his reply obviously is income nothing, I can't spend it. If I don't expend it, I won't have a job, I won't have any income, that's part of my making a living. So that that's where our dispute arises.

Should these work-related expenses be credited to the medically needy, the fellow who's working, earning money but who has work-related expenses? The Plaintiffs contend that the law requires that the medically needy be given the same credits, rights, with reference to work-related expenses as the AFDC man. And that by reason of the failure to do that, raise a question of protection under the Constitution which I never reached because I found that there was a conflict between the Social Security Law and regulations and the State Administration of the Medicaid Law which resulted in the regulations, Social Security Act and regulations taking precedence under this Family Supremacy Laws of the Constitution. The jumping-off point to the law is Section 1396(a) of Title 42 of the United States Code which mandates that a state that has agreed to have Medicaid must do certain things and it must administer its Medicaid operation pursuant with state plan meeting the requirements of that section.

Now, the state plan must have certain things in it. Insofar as affording medical assistance to categorically needy, the state needn't supply such medical assistance under the Social Security Act, however if they do undertake to supply it, then they must supply it in accordance with the Social Security Law and the regulations under that. Those regulations do vastly and grossly simplify an almost unintelligible maze of language, provide in substance that medically needy people should be given or allowed the same work deductions, work-related expense deductions as persons under AFDC. The law requires that the eligibility for assistance and the amount of assistance be as determined in accordance with comparable standards referring to standards of the categorically needy, so that that be-

comes the measure or the criteria, that's one of the things state plan must include. It must include reasonable standards in determining eligibility for and the extent of medical assistance which are consistent with the objectives of the law. And it further states that the plan, state plan must provide for taking into account only—and I'm quoting now from 42 USC 1396(a)(17)—only such income and resources as are—as determined in accordance with standards prescribed by the Secretary available to the applicant or recipient—and I underscore the word "available".

The regs that flush out the statute provide in part, referring to the medically needy, that the "income levels for maintenance must be as a minimum at the higher of the levels of the payment standards generally used as a measure of financial eligibility and the money payment programs" and they further refine it by stating "in the case of families of three or more at the level of the payment standard of the state plan approved under Title 4-A", that's the AFDC plan, generally applies.

So that the standard that's fixed seems to me to be fixed quite definitely and without any ambiguity other than the ambiguity that's inherent in the Social Security Law and regulations as a whole. The regulations which I just referred to was 45 CFR Section 248.3(c). That same section in Subdivision (i) provides that in considering all income and resources when establishing eligibility the state plan must provide for—referring to a situation such as we have, "consideration of all disregards applicable to income and resources which are utilized when determining eligibility or setting aside the future needs under the state's approved Title 4-A plan, the AFDC plan. In other words, the whole law's—loss comes down to the simplest proposition is this, it seems to me. There is no question that categorically needy, AFDC people, get credit for work-related expenses. Under the administration of this law by the

Commissioner of Social Services in this State the medically needy do not. I think that's the whole thing wrapped up in a nutshell, and the only question is, is that required? I think I have demonstrated that it's been required under the statute, under the regulations and it's been held to be a requirement by the Supreme Court of New York in *Newborn against Toia,* 391 NYS 2d 786, 1976. During the course of the argument much was made of that case by both parties.

There is no question that it held flatly what I have just stated, that it permitted work-related expenses to be credited in the case of the medically needy. The only question that seems to have arisen in connection with that case is did the Commissioner just disregard the Court and say, well, Newborn got a ruling favorable to him and we're going to comply with it as to him but as to no one else—that's the crux placed on it by the Plaintiff.

The Defendant explains the Commissioner's situation with reference to Newborn and says the only reason that the Commissioner didn't appeal from that decision so that it wouldn't stand as having any precedental value is because on the remand it was found that the man was ineligible with or without the disregards and consequently the case was mooted out. However, the District Court has upheld the—substantially the same philosophy in relation to the medically needy while in *Aitchison against Burke* 404 F Sup 137 Southern District of NY 1975, affirmed 538 F 2d 307 2d Cert.—Cert denied—429 US 819 1976. While that case revolved around a different item, that case related to a disparity in renting allowances or a disparity in the way rent allowances were figured for categorically needy or AFDC people and medically needy, and the holding of the Court basically is unmistakably that they must be treated alike in that respect.

The HEW which administers the law in a series of letters going back to at least October 16, 1975 and continuing

until I think this past June, the latter part of June, have been—have taken the position that it's taking here by the Plaintiff, have directed the Commissioner of the Department of Social Services of New York's attention to the effect that the HEW considers them in violation. They've reported them on a compliance report ever since or earlier than that first report and that they're continuing to do it, so that bolstering the judicial interpretation of these—of comparable or similar sections is the construction placed on the identical sections by the Bureau or Department of—under whose administration the law is or under whose agents the law administers. I don't think I need to cite cases.

It's Hornbook law that interpretation by the agency who supplies, by law, to administer a law should be given great weight. Now, the Defendants claim that, as I interpret the argument, first that the Commissioner of the Court, is sort of caught in a bind. New York statute set out specific items that should be deducted. They don't say anything about work-related expenses ergo he would be violating state law, his oath of office, were he to grant these deductions.

While I see in Legislative mandates some leeway for him to act otherwise of course he's the man in the first instance that must interpret the law and satisfy his conscience in relation to its interpretation. He then says that, in substance, that there is no disparity or no conflict between the Social Security Act requirements and what he's doing. And he says that there is no conflict because in the flat amounts that are fixed as the sustenance level for medically needy the Legislature has included an amount for work-related expenses. Of course that's hardly an answer. That to my mind is very similar to the claim that was made in Aitchison and was not allowed.

In other words if I'm the claimant for medical assistance, under the category of medically needy persons it's my actual work-related expenses that should be deducted, not such an amount as the State Legislature presumably has hidden in the base amount. Now, that might have more force if the base amount fixed in the Social Security Act were a fixed amount, either in dollars or by formula, but it isn't.

The requirement of the Social Security Law is that it be at least the amount that becomes the sustenance level for categorically needy, and it permits the State such as New York and much to its credit in most people's view—to its discredit in view of others—it has treated medically needy more liberally than it needs to, but if it takes that liberal stance, it can't renege on it. It's just liberal.

Now, if the State of New York Legislature, this amount includes an amount for work deduction expenses, all he need do is lower the base amount. As a matter of fact I can do that for the other categories as well. I don't think it's necessary to even comment on the damage that accrues to a person such as Toomey by reason of the administration of the law and the way it is and the way it's being administered, assuming of course that the administration is wrong, because Toomey is being denied daily benefits to which he would be entitled for proper administration of law.

Now, the Plaintiff has asked for a—that it be certified as a class action. Mrs. Meadvin communicated with my law clerk yesterday and said that the Commissioner would of course obey any order of the Court and subject to stays that might be granted, would apply it generally—and I appreciate that cooperation. However, I've thought about it and I don't know that that saves anyone any problems because I've got to define a class in any event. And as long as I need to define the class and as long

Appendix "F"

as it's the Commissioner's intent to comply I think it's probably preferable and I may be saving myself and Counsel some work by defining class rather than having the Commissioner interpret what might or might not be the class—by leaving it open to his judgment. So that I think that the elements for class action for certification, certainly there is no animosity, that's been conceded, there is no question to be raised or none has been raised of what's involved, are common questions of law, that this is a typical claim, that is it's typical in the sense that we're only going to deal with the effect of the refusal to credit work-related expenses in the same manner for AFDC and medically needy, and I believe that the answers themselves and in any event I'm satisfied that the main complaint of the Plaintiff's Counsel was fairly and adequately to represent the class—consequently the requirements for class are met.

And I think that since the Commissioner has applied this uniformly perhaps with the exception of the Newborn, there is no question again that he's acting on grounds that are applicable to the entire class. Now, the class itself it seems to me is not a difficult class to form. First we're dealing wholely with medically needy people. We all know what that is and we're dealing with the disparities and treatment of work-related expenses between categorically—or between AFDC recipients and medically needy recipients for medical assistance.

So that the class would consist of medically needy persons in the State of New York who will, in the future, apply for medical assistance to any office of the Department of Social Services, and because of the manner in which I regard the prospective and retroactive questions that have arisen in the case, I've included all persons who have so applied since June 1, 1977.

Appendix "F"

The reason that I've done that is that in my view upon the filing of an application for medical assistance by a medically needy person that application entitles the applicant, if eligible, to benefits for the calendar month in which the claim is filed and for the preceding three calendar months. That's provided by 42 USC Section 1396(a) 34. Since the rights do not approve a medically needy person until an application has been made and since the rights of accruing at that time include medical assistance to which that person would have been entitled any time during the month in which the application is made or three preceding months, I regard the rights accruing upon the filing of the application as present rights.

Consequently the Order of the Court is being applied prospectively only, even though it includes persons who have filed applications made within the period mentioned. Prospectivity in the application of the judgment is maintained by limiting the medical assistance to medical expenses in connection with services or supplies rendered the applicant on or after June 1, 1977.

The mechanics that I'm using here are substantially equivalent to treating all applications made since June 1st as having been made on the date of this Order. Through this mechanism the rights of the medically needy are protected without the additional burden on them or on the Social Services Department of having to deal with new claims being filed in order that the medically needy have an opportunity to benefit from this judgment.

Now, in addition to seeking a certification for the Plaintiff's class, the Plaintiffs also sought a certification of a Defendant's class to consist of all 58 Commissioners of local Social Service Departments or Districts. I think I made it clear on the record yesterday and I stated my reasons in as much detail as I think need to be stated as to why I considered such a Defendant's class inappropriate and would deny it.

Appendix "F"

The Plaintiffs request an award of attorneys' fees pursuant to the newly enacted amendment, relatively new, to 42 USC Section 1988, by its specific language that section permits the prevailing party in the 1983 action to recover such fees. The Defendants opposed the award of attorneys' fees. In an argument that I disclosed I was having difficulty in following the Defendants in part seemed to say that 1988 limits the award of attorneys' fees to actions whose jurisdiction is supported by Section 1983. That the jurisdiction in this case is concededly supported by 28 USC Section 1343 Subdivision (3). And that consequently the Plaintiffs don't come within the provisions of Section 1988 granting of an award of attorneys' fees.

The problem there is that 1983 merely gives a cause of action, it doesn't afford jurisdiction. Its counterpart, jurisdictional counterpart Section 1343-3 does, and there is no mention of jurisdiction in the amendment to 1988. 1988, the amendment is merely—I just looked at the section, I thought I brought it out on the bench with me but I didn't—but I just looked at it and the amendment is only the last sentence and it only deals with attorneys' fees in civil rights cases specified by Code section and 1983 is one of the sections.

Now, the Defendants haven't specifically raised the Eleventh Amendment bar to the award but I think it's been lurking around sufficiently that it should have a ruling. I think that the answers in *Fitzpatrick against Bitzer,* 427 US 445, and while that was a Title VII action the same, exactly the same rationale it seems to me would apply to 1988. Both sections relied on—later the source of their power, Section 5 of the Fourteenth Amendment, consequently I can't see any distinction. All the Courts of Appeals have ruled on the question have held that attorneys' fees from that bar of the Eleventh Amendment with the exception of I believe one District Court, the Second Circuit, hasn't ruled on whether they made the award or not, but you might glean some significance from the fact in *Holly against Lavine,* 553 F 2d 845 remanded to the District Court, one of the questions that was remanded was attorneys' fees and that was a similar action. In fact, its predecessor in the office, Abe Levine.

Appendix "F"

Now, I was troubled somewhat yesterday in balancing the justifications given for the mandate's enforcement by the Commissioner because he was—could be doing exactly what he says. He consciously feels that he's obliged under his construction of the law to apply these rules as he has applied them. It doesn't seem to coincide with the views of the Acting Commissioner at the present time, his memo in connection with the Bill that was proposed—no place indicates that the construction placed on the Act by the Department of Social Services is the correct construction. In fact he ended—to be gleaned from Mr. Shang's memo to the company proposed Bill to change the law, it's that the HEW position is not wrong. So that—but I'm not considering the Defendants, I'm going to grant attorneys' fees and I'm going to grant them not on the basis of the Defendant's conduct but rather on the service rendered by the Plaintiffs and by the Plaintiffs' attorney.

Here claims involving $60.00, $20.00, small claims in the accumulative effect of which, according to the Defendant, runs into many millions of dollars.

Now, except as a class action, what attorney would undertake the prosecution of these claims? No attorney realistically would approach the work that needs to be done in handling these cases unless he's an extremely wealthy man practicing without any regard to his remuneration, he wouldn't consider it. So that these cases of necessity, if they're going to be prosecuted need to be prosecuted by attorneys working for funded agencies such as the Plaintiff's attorney are working for.

I listened with very sympathetic ear to the County Attorney. I think he really is caught between sill and grips. He can't do what he would like no matter what he would like. He gets a directive from the State Commissioner and he's obliged to comply. So that he's more-or-less in a position in all of these cases with rare exceptions, I've had one or two Welfare cases where the County Commissioner could easily be the rascal if there is one, but in this case that certainly isn't the situation.

This County Commissioner had no advice in what's being done, he had no opportunity to control it. I think that it would be inaccurate to award any county any attorney's fees against him. Accordingly the attorneys' fees that are being allowed are going to be allowed solely against the State Commissioner and as I've indicated those fees are not being awarded to the Plaintiff on the basis of the Defendant's conduct but rather on the basis of the need for services such as those rendered in this case by the Plaintiffs.

The question of whether or not publicly-funded legal services offices may get such an award has been decided in this Circuit in favor of the award of such fees in *Torres against Sachs,* 538 F 2d 10, Second Circuit 1976. And to emphasize the basis on which I'm awarding fees in this case I'll quote from that case at Page 13. It says, "Attorneys' fees are not awarded necessarily to punish for bad faith but to recompense those who by helping to protect basic rights are thought to have served the public interest. A principal purpose of the legislation is to encourage people to seek judicial redress upon offering of discrimination." Now, can't say that I'm holding in accord whatever he said in that case but I'm certainly in accord with the statement that I just read.

The Plaintiffs have asked that if attorneys' fees are allowed, that they be fixed by agreement of the parties, and if that's impossible, then by the Court. I follow that

suggestion and the particular procedure by which the Court will fix the fees if necessary will be worked out with Counsel at such time as it becomes necessary. By that I mean whether we'll do it on affidavits, whether we'll do it on Evidentiary Hearing or how, however, I don't know.

I think these following conclusions evolve certainly from what I've said up to this point, the Court has jurisdiction of the subject matter of the parties. It appears that Defendants are violating the Social Security Law and Regulations by the manner in which they are treating work-related expenses of the medically needy in connection with eligibility and moderate benefits under the Medical Assistance Plan. Plaintiffs are entitled to judgment against the Defendant Toia, Shang and Russo declaring the rights of the parties and in joining Defendant Shang as provided in the judgment which would be entered in the Hearing today. The judgment to be entered here will be without cost to the Defendant Russo—just a minute, is to be entered dispensing a Complaint against the Defendant Fahey without costs is moot. The Defendants—or the Plaintiffs' demand rather for damages and retro-activity benefits are denied. Plaintiffs' motion for certification as a class action is granted to the class as defined in the Order to be entered.

Plaintiffs' motion as certified Defendants' class is denied. Defendants' motion to dismiss—motions, there were two to dismiss, are denied except as to the Defendant Fahey. Motion to award Defendant attorneys' fees to the Plaintiff is granted, the amount to be fixed by agreement of the parties by the Court on application, and the judgment to be entered, blank space to be provided for the insertion of the amount.

I've dictated a Judgment in accordance with the Decision that I've just dictated onto the record. I will ask Counsel to remain, give me an opportunity to examine the Judg-

ment, sign it, file it with the Clerk and he'll serve certified copies on both of you. That is an unusual procedure for me but it's particularly more in this case I think to eliminate any question as to when the Judgment becomes effective because this is the last day of the month and if I waited until next week, we run into another month and I don't think that's right. If I'm right, these people are entitled to be paid for this month.

Mr. Reixach: I just had a question before, but my question is to the scope of the relief.

The Court: In what respect?

Mr. Reixach: As I understand it the relief is drafted in terms of persons who applied on or after June 1, 1977 and for the medical expenses incurred on or after June 1, 1977. By referring to the application do you mean—well, what about a person for example such as Mr. Toomey who was currently in receipt of medical assistance during the month of June, July and August, are there—in other words—

The Court: The Judgment will require a recomputation.

Mr. Reixach: For everyone back in June 1, 1977?

The Court: That's right.

Mr. Reixach: That's what I was unclear about.

The Court: At least that's my recollection of what I dictated. I'll get it right now. Dick, see if Mary has a copy of it. If she has, I'll go over it on the record, if it needs changes or if you suggest changes.

Mrs. Meadvin: Your Honor, on behalf of the Defendant I'd like to make a formal application for a stay.

The Court: Well, my Judgment includes a stay. As a matter of fact in the Plaintiffs'—I don't know whether you know this or not—lose sight of so many findings and conclusions, but I think 69 or 70, something like that, of the Plaintiffs' findings or conclusions indicated a thirty-day stay to continue during an appeal, so that so long

as the Plaintiffs found that satisfactory I only modified it but reducing it to fifteen days to continue during appeal and the reason for that is to jog you along with filing your Notice of Appeal.

Mr. Reixach: Your Honor, I believe that the Plaintiffs propose a stay related only to the retro-activity period. I am concerned about in particular what the event that—

The Court: Well, I think the Judgment protects any applicant for medical assistance who comes within this class back to June 1.

Mr. Reixach: And in any event certainly—certainly as of today in any event, even without retroactivity, the problem I'm concerned about, your Honor, is what happened in Aitchison where the Judgment was entered in December, there was stays up to February and now it appears subject to further clarification by the State that at least in New York City, Cowl, no one told him to do so, apparently they didn't keep any records of the people who were denied under the illegal standard during the period of the stay and so he said, "Well, we can't recompute".

The Court: Well, after directing the—or after ordering the State Commissioner to direct the local Commissioners to do it or to do it himself, I don't care, do some re-computing, do some notifying. The Judgment at the very end provides that the re-computation to be made herein and the determination of any applications for medical assistance made hereafter shall be computed or recomputed in the accordance with this Judgment for any period subsequent to June 1, 1977.

Mr. Reixach: All right, I assume that they'll have to get out a probated instruction if they have any hope of implementing that.

The Court: I don't know. Now, the English language is not the best instrument for drawing pictures and I'm

not the best artisan in the use of English language but that's as well as I can do for help.

Mrs. Meadvin: Your Honor, you have provided for fifteen days?

The Court: I provided this, ordered that this Judgment shall be stayed for a period of fifteen days and in the event a Notice of Appeal is duly filed within said period the stay is continued pending determination of said appeal in the Court of Appeals. The stay granted herein however shall in no way affect the computation or recomputation of benefits to the class. That was there for the purpose of avoiding the situation that you made.

Mr. Reixach: Yes, your Honor, I would make one request. As the Plaintiff Toomey, who since August 4th have been protected by the Temporary Restraining Order, and I think that the Defendant has consented to this. That would apply to the named Plaintiff Toomey?

The Court: Well, I think what I should do is continue Temporary Restraining Order as to Toomey.

Mr. Reixach: All right, your Honor.

The Court: Thanks for that suggestion, it hadn't occurred to me. Do you remember offhand that T.R.O. number on Martin or both of them?

Mr. Reixach: I believe it just ran to the Plaintiffs.

The Court: We'll look at it, we've got a copy. I think it referred to the named Plaintiffs—I don't know.

Mr. Reixach: I do think we need the name both Mr. and Mrs. Toomey and the children with that name because they're all under the program.

The Court: I'll read you a tentatively prepared Order in this case after the preliminary proceedings. Ordered that this action is maintainable as a class action pursuant to 23-A, 23-B (2). Now, I'm omitting the things that I'm sure you know. The class consists of medically needy persons in the State of New York who will in the future apply

for medical assistance to any office of the Department of Social Services or who have so applied since June 1, 1977.

Further ordered the Plaintiffs' motion in certified Defendants' class being the same as higher be denied.

Further ordered and adjudged and decreed the action is hereby dismissed as to the Defendant John Fahey individually and as the Commissioner of Albany County Department of Social Services is moot without costs.

It's further ordered that the Defendant's Motion To Dismiss are hereby denied in all respects except as hereinabove granted.

Further ordered that Plaintiffs' demand for damages for retroactive being the same are denied.

Further ordered and adjudged and decreed Defendant's policy including the manner in which New York Social Services Law Section 366.2 and 18 NYC RR 360.5A as applied are illegal in that they conflict with the Social Security Act and regulations issued thereunder insofar as they do not provide the same disregards and deductions from gross income of all work-related expenses for medically needy as are used to determine eligibility for or the amount of—said benefits—no, it isn't said benefits—for the amount of said benefits for AFDC, is what it should be.

Fourth, ordered and adjudged and decreed that the Plaintiffs have judgment for attorneys' fees is fixed by the Court in the amount of blank dollars. Well, I guess that's got to be transposed. Fees in the amount of blank dollars is fixed by the Court. Against the Defendants Philip L. Toia and Carmen Shang as Commissioner of New York State Department of Social Services and as Acting Commissioner of New York State Department of Social Services respectively.

Further ordered and adjudged and decreed that the Defendant Shang's successors are to be and hereby directed, ordered to comply with the same disregard and work-

related expenses to the medically needy as are applied to AFDC recipients for medical assistance.

Further ordered that the Defendant Shang's successors in office are hereby directed to give notice or cause the appropriate local Department of Social Services to give notice in writing within so many days of the judgment.

How long will it take to get this notice machinery ordered?

Mrs. Meadvin: I understand that within ten days.

The Court: You won't in ten days.

Mrs. Meadvin: You mean notice of the Order?

The Court: The Commissioner, in all probability, will send out a directive to the—I dont know how the machinery is set up but I would guess that he would send it directly to the local people to send the following form and letter to—

Mrs. Meadvin: That's correct.

The Court: Now, do they have those on the computers?

Mrs. Meadvin: This I don't know.

Mr. Reixach: I think it varies, frankly, your Honor, from county to county. I know that Monroe County does, which they produce the computer print-out that they can use when they use on the Aitchison but whether other counties are computerized or capable of it I don't know.

The Court: I think it will take more than ten days, but in any event the realistic approach here is that this won't be done because of the Appeal, consequently after an Appeal if it should be affirmed, between the time of the Appeal and the mandate you could stipulate to either enlarge the time if necessary or make a motion to modify the judgment.

Mr. Reixach: We would not have any objection to any reasonable enlargement—we did that in the Aitchison case. The Judge gave us fifteen days and we stipulated to twenty-five.

The Court: Well, why don't we say thirty days? I think they probably can accomplish it in that time. I don't like to get it too long because that's a tendency to wait until the end of the period.

Mr. Reixach: We have no objection to a thirty-day period, your Honor.

The Court: Is that all right?

Mrs. Meadvin: I didn't hear.

The Court: What this is requiring is the notice in writing within thirty days to all members of the class, and this is what the notice is, that upon request the amount of medical assistance to which said class member is entitled will be re-computed, disregarded the work-related expenses.

Mrs. Meadvin: So this is the administrative directive to the local Commissioners?

The Court: No, this is what either the Commissioner or the local people are to be directed to do—send a letter to all the members of the class saying upon your request this case has been decided upon your request, we'll recompute your benefits by disregarding work-related expenses.

Mrs. Meadvin: I think that would be agreeable.

Mr. Reixach: We can work out any accounting problems.

The Court: Said notice shall contain a statement that the request must be made within another thirty days, we'll say, and you guys work that out.

Mr. Reixach: I would just, from the Plaintiff's point of view, your Honor, the typical—well, the only concern I have is that people are going to have to get this from some of these State employers—I would request forty-five days, a little longer time for the—people to actually come in and file.

The Court: All right, make it forty-five days. Of course these things get stale, they get that much harder to handle. They're going to be stale as it is.

Appendix "F"

Mr. Reixach: I understand that, your Honor.

The Court: And that measures from the date of notice sent to the recipient. And of course what I'm thinking, why I'm requiring the medically needy recipient fellow to apply—not to apply but to request a re-computation is because I might have had a difference of $5.00, it isn't worth my time—I'm back to work and got a good job, it isn't worth the bother, probably cost the Social Services $50.00 to re-process that re-computation, and it will take me away from my job—I know very well if I request it, they'll be sending me a notice to come down and say what did you do on November 30th, and I'll lose a half-day's pay. So that I'm putting some burden on the recipient, he isn't going to get it automatically. And must further state the other necessary and reasonable requirements for determining eligibility.

Further ordered that the re-computation be made herein and the determination of any applications for medical assistance made hereafter shall be computed and re-computed in accordance with this Judgment for any period subsequent to June 1, 1977.

Then we've got the stay and then we've got the continuance of the Temporary Restraining Order as to Toomey's. I think we've got just about everything included in there. And I'll appreciate if you wait for filing to be done on September 30th.

Mr. Reixach: Certainly, your Honor.

Mrs. Meadvin: Very well.

(Conclusion of Proceedings.)

Appendix "F"

CERTIFICATE

STATE OF NEW YORK
COUNTY OF ONONDAGA
CITY OF SYRACUSE
} ss.:

I, JOHN F. DRURY, do hereby certify that this is a true and correct transcript of the proceedings held in the foregoing matter as herein contained, to the best of my ability.

JOHN F. DRURY
John F. Drury

Dated: 11-1-77

APPENDIX "G"

Statutes and Regulations.

42 USC § 1396a(a)(10)(17)

§ 1396a. State plans for medical assistance—Contents

(a) A State plan for medical assistance must—
(10) provide—

(A) for making medical assistance available to all individuals receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter;

(B) that the medical assistance made available to any individual described in clause (A)—

(i) shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual, and

(ii) shall not be less in amount, duration, or scope than the medical assistance made available to individuals not described in clause A; and

(C) if medical assistance is included for any group of individuals who are not described in clause (A) and who do not meet the income and resources requirements of the appropriate State plan, or the supplemental security income program under subchapter XVI of this chapter, as the case may be, as determined in accordance with standards prescribed by the Secretary—

(i) for making medical assistance available to all individuals who would, except for income and resources, be eligible for aid or assistance under any

such State plan or to have paid with respect to them supplemental security income benefits under subchapter XVI of this chapter, and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services, and

(17) include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with respect to income levels, but only in the case of applicants or recipients of assistance under the plan who are not receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, and with respect to whom supplemental security income benefits are not being paid under subchapter XVI of this chapter based on the variations between shelter costs in urban areas and in rural areas) for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient and (in the case of any applicant or recipient who would, except for income and resources, be eligible for aid or assistance in the form of money payments under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV, or to have paid with respect to him supplemental security income benefits under subchapter XVI of this chapter as would not be disregarded (or set aside for future needs) in determining his eligibility for such aid, assistance, or benefits, (C) provide for reasonable evaluation of any such in-

Appendix "G"

CODE OF FEDERAL REGULATIONS

42 C.F.R. § 448.3*

42 C.F.R. § 448.3

(b) With respect to both the categorically needy and, if they are included in the plan, the medically needy a State plan must:

(1) Provide that only such income and resources as are actually available will be considered and that income and resources will be reasonably evaluated.

• • •

(c) With respect to the medically needy, the State plan must:

(1) Provide levels of income and resources for maintenance. In total dollar amounts, as a basis for establishing financial eligibility for medical assistance. Under this requirement:

• • •

(ii) Except as specified in paragraph (c) (1) (iii) of this section, the income levels for maintenance must be, as a minimum, at the higher of the levels of the payment standards generally used as a measure of financial eligibility in the money payment programs, that is:

(A) In the case of families of three or more at the level of the payment standard of the State plan approved under title IV-A generally applied;

(B) In the case of individuals, or families (including families with children) of two persons, at the

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* Formerly codified as 45 C.F.R. § 248.3 and recodified effective October 1, 1977 as 42 C.F.R. § 448.3. 42 Fed. Reg. 52826-52827 (Sept. 30, 1977). The prior proceedings and other cases were before the recodification and refer to the prior citation.

Appendix "G"

higher of:

(1) The payment standard of the State plan approved under title IV-A generally applied

• • •

(2) Provide that there will be a flexible measurement of available income which will be applied in the following order of priority:

(ii) First, for maintenance, so that any income in an amount at or below the established level will be protected for maintenance, except that this does not preclude imposition of any enrollment fee, premium or similar charge, or of copayments or deductibles pursuant to § 249.40 of this chapter;

(3) Provide that all income and resources will be considered in establishing eligibility and for the flexible application of income to medical costs not in the plan, and for payment toward the medical assistance costs. In considering all income and resources when establishing eligibility the State plan must provide for:

(i) In the case of families and children, consideration of all disregards applicable to income and resources which are utilized when determining eligibility, or setting aside for future needs under the State's approved title IV-A plan:

45 CFR § 233.20

§ 233.20 Need and amount of assistance.

(a) *Requirements for State Plans.* A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:

(1) *General.* Provide that the determination of need and amount of assistance for all applicants and recipients

will be made on an objective and equitable basis and all types of income will be taken into consideration in the same way, except where otherwise specifically authorized by Federal statute.

(2) *Standards of assistance.* (i) Specify a statewide standard, expressed in money amounts, to be used in determining (*a*) the need of applicants and recipients and (*b*) the amount of the assistance payment.

(ii) In the AFDC plan, provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions in accordance with subparagraph (3)(viii) of this paragraph. Nevertheless, if a State maintains a system of dollar maximums these maximums must be proportionately adjusted in relation to the updated standards.

(iii) Provide that the standard will be uniformly applied throughout the State.

(iv) Include the method used in determining needs, which must be one of the three methods described in "Guides and Recommendations" or a comparable method which meets the conditions specified in such guides and is approved by the Assistant Payments Administration.

(v) If the State agency includes special need items in its standard, (*a*) describe those that will be recognized, and

the circumstances under which they will be included, and (*b*) provide that they will be considered in the need determination for all applicants and recipients requiring them.

(vi) If the State chooses to establish the need of the individual on a basis that recognizes, as essential to his well-being, the presence in the home of other needy individuals, (*a*) specify the persons whose needs will be included in the individual's need, and (*b*) provide that the decision as to whether any individual will be recognized as essential to the recipient's well-being shall rest with the recipient.

(vii) Provide that assistance payments to any tenant or group of tenants in low-rent housing will not be reduced because of the rent reduction resulting from the application of the not more than 25 percent of income rent limitation in section 2(1) of the U.S. Housing Act of 1937 as amended, 42 U.S.C. 1402(1). Under this requirement, if a State provides for shelter on an "as paid" basis, the amount recognized for shelter for a public housing tenant is the amount that would have been recognized on December 22, 1971, for a tenant in the same assistance program with like family composition living in the public housing unit.

(3) *Income and resources: OAA, AFDC, AB, APTD, AABD.* (i) Specify the amount and types of real and personal property, including liquid assets, that may be reserved, i.e., retained to meet the current and future needs while assistance is received on a continuing basis. In addition to the home, personal effects, automobile and income producing property allowed by the agency, the amount of real and personal property, including liquid assets, that can be reserved for each individual recipient shall not be in excess of two thousand dollars. Policies may allow reasonable proportions of income from busi-

nesses or farms to be used to increase capital assets, so that income may be increased.

(ii) Provide that, in determining need and the amount of the assistance payment, after all policies governing the reserves and allowances and disregard or setting aside of income and resources referred to in this section have been uniformly applied:

(A) in determining need, all remaining income and resources shall be considered in relation to the State's need standard;

(B) in determining financial eligibility and the amount of the assistance payment, all remaining income and resources may, at the State's option, be considered in relation to the State's need standard, or the State's payment standard;

(C) if agency policies provide for allocation of the individual's income as necessary for the support of his dependents, such allocation shall not exceed the total amount of their need as determined by the State's need standard;

(D) net income available for current use and currently available resources shall be considered; income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance;

(E) income and resources will be reasonably evaluated For purposes of this paragraph (a) (3); Automobile means a passenger car or other motor vehicle used to provide transportation of persons or goods: Retail market value means the price an item of a particular make, model, size, material or condition will sell for on the open market in the geographic area involved; Liquid assets are

those properties in the form of cash or other financial instruments which are convertible to cash and include savings accounts, checking accounts, stocks, bonds, mutual found shares, promissory notes, mortgages, loan value of insurance policies, and similar properties; Need standard means the money value assigned by the State to the basic and special needs it recognizes as essential for applicants and recipient;

(iii) Provide that no inquiry will be made of the amount of earnings of a child under 14 years of age.

(iv) Provide that, in determining the availability of income and resources, the following will not be included as income (*a*) Income equal to expenses reasonably attributable to the earning of income (including earnings from public service employment); (*b*) loans and grants, such as scholarships, obtained and used under conditions that preclude their use for current living costs; and (*c*) home produce of an applicant or recipient, utilized by him and his household for their own consumption.

(v) Provide that agency policies will assure that in determining the eligibility of an individual for an assistance payment or the amount of such payment, child support amounts which are collected as part of the State's child support enforcement program will be treated in accordance with § 232.20. Any child support amounts for which an assignment pursuant to § 232.11 is effective, which are received directly by the assistance unit shall be paid to the State child support enforcement unit. Whether or not the support payments are received regularly, the agency does not delay or reduce public assistance payments on the basis of assumed support which is not actually available.

(vi) Except for child support obligations assigned pursuant to § 232.11 of this chapter, if the State agency holds

relatives responsible for the support of applicants and recipients, (*a*) include an income scale for use in determining whether responsible relatives have sufficient income to warrant expectation that they can contribute to the support of applicants or recipients, which income scale exceeds a minimum level of living and at least represents a minimum level of adequacy that takes account of the needs and other obligations of the relatives; and (*b*) provide that no request will be made for contributions from relatives whose net cash income is below the income scale. In family groups living together, income of the spouse is considered available for his spouse and income of a parent is considered available for children under 21.

(vii) If the State agency establishes policy under which assistance from other agencies and organizations will not be deducted in determining the amount of assistance to be paid provide that no duplication shall exist between such other assistance and that provided by the public assistance agency. In such complementary program relationships, the provisions of subdivisions (iii) through (viii) of this subparagraph; and

(ii) Provision for disregarding earned income for the period during which it is earned, rather than when it is paid, in cases of lump-sum payment for services rendered over a period of more than 1 month.

(iii) The term "earned income" encompasses income in cash or in kind earned by a needy individual through the receipt of wages, salary, commissions, or profit from activities in which he is engaged as a self-employed individual or as an employee. Such earned income may be derived from his own employment, such as a business enterprise, or farming; or derived from wages or salary received as an employee. It includes earnings over a

period of time for which settlement is made at one given time, as in the instance of sale of farm crops, livestock, or poultry. In considering income from farm operation, the option available for reporting under OASDI, namely the "cash receipts and disbursements" method, i.e., a record of actual gross, of expenses, and of net, is an individual determination and is acceptable also for public assistance.

(iv) With reference to commissions, wages, or salary, the term "earned income" means the total amount, irrespective of personal expenses, such as income-tax deductions, lunches, and transportation to and from work, and irrespective of expenses of employment which are not personal, such as the cost of tools, materials, special uniforms, or transportation to call on customers.

(v) With respect to self-employment, the term "earned income" means the total profit from business enterprise, farming, etc., resulting from a comparison of the gross income received with the "business expenses," i.e., total cost of the production of the income. Personal expenses, such as income-tax payments, lunches, and transportation to and from work, are not classified as business expenses.

(vi) The definition shall exclude the following from "earned income": Returns from capital investment with respect to which the individual is not himself actively engaged, as in a business (for example, under most circumstances, dividends and interest would be excluded from "earned income"); benefits (not in the nature of wages, salary, or profit) accruing as compensation, or reward for service, or as compensation for lack of employment (for example, pensions and benefits, such as United Mine Workers' benefits or veterans' benefits).

(vii) With regard to the degree of activity, earned income is income produced as a result of the performance of

services by a recipient; in other words, income which the individual earns by his own efforts, including managerial responsibilities, would be properly classified as earned income, such as management of capital investment in real estate. Conversely, for example, in the instance or capital investment wherein the individual carries no specific responsibility, such as where rental properties are in the hands of rental agencies and the check is forwarded to the recipient, the income would not be classified as earned income.

(viii) Reserves accumulated from earnings are given no different treatment than reserves accumulated from any other sources.

(7) *Disregard of earned income: method.* (i) Provide that the following method will be used for disregarding earned income: The applicable amounts of earned income to be disregarded will be deducted from the gross amount of "earned income," and all work expenses, personal and non-personal, will then be deducted. Only the net amount remaining will be applied in determining need and the amount of the assistance payment.

(ii) In applying the disregard of income under subparagraph (11)(ii)(*b*) of this paragraph to an applicant for AFDC, there will be a preliminary step to determine whether there is eligibility without the application of any AFDC provisions for the disregard or setting aside of income. If such eligibility exists, the next step is to determine need and the amount of assistance by disregarding income and deducting work expenses in accordance with the method described in subdivision (i) of this subparagraph.

(8) *Disregard of earned income applicable only to OAA, APTD, or AABD.* If the State chooses to disregard earned income, specifiy the amount to be disregarded of the first

$80 per month of income that is earned by an aged or disabled individual claiming OAA, APTD, or AABD, who is not blind, but not more than $20 per month plus one-half of the next $60 of such earned income.

45 CFR § 248.3 provides in pertinent part:

(3) Specify the extent to which the financial responsibility of any such relatives is taken into account.

(4) Provide that a lower income level for maintenance shall be used for individuals not living in their own homes but receiving care in hospitals, skilled nursing facilities, intermediate care facilities, and institutions for tuberculosis or mental diseases which are covered under title XIX. This lower income level must be reasonable in amount for clothing and personal needs for such individuals, and

(i) For aged, blind, and disabled individuals, such income level must be at a minimum of $25.00 per month;

(ii) For others, States may establish reasonable standards different from that specified in subdivision (i), provided they are based on a reasonable differential in personal needs.

When such an individual's home is maintained for a spouse or other dependents, the appropriate income level for such dependents, plus the individual's income level for maintenance in a long-term care facility, shall be applied. A higher level of maintenance may also be applied for a temporary period, not to exceed six months, to allow an individual to apply his income and resources to maintenance of a home if a physician has certified that such individual is likely to return to the home within such temporary period.

(5) Provide, for individuals in long-term care facilities specified in paragraph (b)(4) of this section, for the ap-

plication of income first to personal needs, and for the medically needy only, to any title XIX enrollment fee, premium or similar charge imposed under section 1902(a)(14)(B) of the Act, and provide for the application of the remainder to the cost of medical or remedial care.

(6) Provide that, with respect to an aged, blind, or disabled individual receiving a benefit under title XVI or a State supplemental payment, who is not eligible for medical assistance unless he can meet additional eligibility criteria from the January 1972 standard, the amount of such individual's title XVI benefit and State supplemental payment will be disregarded in determining eligibility for medical assistance.

(c) With respect to the medically needy, the State plan must:

(1) Provide levels of income and resources for maintenance, in total dollar amounts, as a basis for establishing financial eligibility for medical assistance. Under this requirement:

(i) Such income levels must be comparable as among individuals and families of varying sizes;

(ii) Except as specified in paragraph (c)(1)(iii) of this section, the income levels for maintenance must be, as a minimum, at the higher of the levels of the payment standards generally used as a measure of financial eligibility in the money payment programs, that is:

(A) In the case of families of three or more, at the level of the payment standard of the State plan approved under title IV-A generally applied;

(B) In the case of individuals, or families (including families with children) of two persons, at the higher of:

(*1*) The payment standard of the State plan approved under title IV-A generally applied, or

(*2*) The highest level of payment which is generally available to individuals in any of the three groups (aged, blind and disabled) who are (or would be, except for income) eligible for benefits under title XIX;

except that this subparagraph (B) shall not be construed to require the provision of medical assistance to any aged, blind or disabled individual who would not be eligible under the medical assistance standard in effect in such State for January 1972.

(iii) The income levels for maintenance may be less than those specified in paragraph (c)(1)(ii) of this section if the level for which Federal financial participation available pursuant to § 248.4(b)(4) is less, but if so, not lower than the Federal financial participation level.

(iv) Resources which may be held must, as a minimum, be at the higher of the levels allowed under the State plan approved under title IV-A or allowed in the supplemental security income program established under title XVI of the Social Security Act, and the amount of liquid assets which may be held must increase with an increase in the number of individuals in a family (except that a State may allow to aged, blind or disabled individuals only the level of resources allowed in the January 1972 medical assistance standard, if this is not less than the State allows the categorically needy). There must be separate levels established for resources.

(2) Provide that there will be a flexible measurement of available income which will be applied in the following order of priority:

(i) First, for maintenance, so that any income in an amount at or below the established level will be protected

for maintenance, except that this does not preclude imposition of any enrollment fee, premium or similar charge, or of copayments or deductibles pursuant to § 249.40 of this chapter;

(ii) Next, income will be applied to costs incurred for medical insurance premiums (including any enrollment fee, premium or similar charge imposed under section 1902(a)(14)(B) of the Act), for any copayments or deductibles imposed under such section, and for necessary medical or remedial care recognized under State law and not encompassed within the State plan for medical assistance. States may set reasonable limits on such medical services for which excess income may be applied. Any medical resource of any individual in the form of insurance or other entitlement will also be applied to such costs. (See also § 250.31 of this chapter regarding third party liability);

(iii) All of the remaining excess income and medical resources in the form of insurance or other entitlement will be applied to costs of medical assistance included in the State plan. Once such income and resources are exhausted, the full amount, duration and scope of care and services provided by the plan are available.

(3) Provide that all income and resources will be considered in establishing eligibility, and for the flexible application of income to medical costs not in the plan, and for payment toward the medical assistance costs. In considering all income and resources when establishing eligibility, the State plan must provide for:

(i) In the case of families and children, consideration of all disregards applicable to income and resources which are utilized when determining eligibility, or setting aside for future needs under the State's approved title IV-A plan;

(ii) In the case of the aged, blind, or disabled, the highest of:

(A) The disregards applied in title XVI, or

(B) The disregards applied in the State supplementary payment program which are available to all individuals who are or would be (except for their income level) eligible for a title XVI benefit,

except that in a State which has limited coverage of the categorically needy by applying eligibility requirements which are the same as or at a level between those in its January 1, 1972 plan and those under title XVI, disregards which similarly fall within January 1, 1972 and title XVI levels, provided that they are at least the same as those allowed to the aged, blind, and disabled categorically needy.

(4) Provide that only such income and resources will be considered as will be "in hand" within a period, not in excess of six months ahead, including the month in which medical services which are covered under the plan were rendered.

N.Y. Social Services Law

§ 366.2. (a) The following income and resources shall be exempt and shall neither be taken into consideration nor required to be applied toward the payment or part payment of the cost of medical care and services available under this title; provided, however, that such income may be required to be applied toward the enrollment fee, as required by subdivision five of section three hundred sixty-seven-a of this title:

(1) a homestead which is essential and appropriate to the needs of the household;

Appendix "G"

(2) essential personal property;

(3) liquid resources in the amount of five hundred dollars for each person, but not in excess of two thousand dollars per family as a burial reserve;

(4) savings in amounts equal to at least one-half of the appropriate income exemptions allowed;

(5) income taxes;

(6) health insurance premiums;

(7) payments for support of dependents required to be made pursuant to court order; and

(8)(i) income in an amount set forth in the following schedule:

Annual net income—Number of family members in a household and family members for whom they are legally responsible or have assumed responsibility

One	Two	Three	Four	Five	Six	Seven
$2,700	$3,800	$4,000	$5,000	$5,700	$6,400	$7,200

Such income exemptions shall be increased by six hundred dollars for each member of a family household in excess of seven.

(ii) on and after October first, nineteen hundred seventy-five income in an amount set forth in the following schedule:

Annual net income—Number of family members in a household and family members for whom they are legally responsible or have assumed responsibility.

One	Two	Three	Four	Five	Six	Seven
$2,700	$3,800	$4,200	$5,000	$5,800	$6,500	$7,400

Appendix "G"

Such income exemptions shall be increased by seven hundred dollars for each member of a family household in excess of seven.

(9) Subject to subparagraph eight, the department, upon the application of a local social services district, after passage of a resolution by the local legislative body authorizing such application, may adjust the income exemption based upon the variations between cost of shelter in urban areas and rural areas in accordance with standards prescribed by the United States secretary of health, education and welfare.

(b) In establishing standards for determining eligibility for and amount of such assistance, the department shall take into account only such income and resources, in accordance with federal requirements, as are available to the applicant or recipient and as would not be required to be disregarded or set aside for future needs, and there shall be a reasonable evaluation of any such income or resources. There shall not be taken into consideration the financial responsibility of any individual for any applicant or recipient of assistance under this title unless such applicant or recipient is such individual's spouse or such individual's child who is under twenty-one. In the application of standards of eligibility with respect to income, costs incurred for medical care, whether in the form of insurance premiums or otherwise, shall be taken into account.

(c) Any inconsistent provision of law notwithstanding, medical assistance shall also be given in the event of catastrophic illness to any person not otherwise eligible under this section; provided, however, that such assistance shall be limited to payment for that portion of the cost of in-patient care, services and supplies while in a medical institution which, after application of available insurance

benefits and resources not exempt under subparagraphs (1), (2), (3) or (4) of paragraph (a) of this subdivision, is in excess of either (i) twenty-five per centum of the recipient's annual net income or (ii) that amount of recipient's annual net income in excess of the applicable cash public assistance eligibility level, whichever is less. Income or resources of responsible relatives shall be deemed income or resources of the recipient for purposes of this paragraph.

18 New York Code Rules and Regulations

§ 85.3 Chapter I Board Rules

Annual Net Income—Minimum Exemptions for Family Household in Which There is at Least One Wage Earner

NUMBER OF FAMILY MEMBERS IN A HOUSEHOLD DEPENDENT ON INCOME INCLUDING ONLY WAGE EARNERS AND FAMILY MEMBERS FOR WHOM THEY ARE LEGALLY RESPONSIBLE OR HAVE ASSUMED RESPONSIBILITY

	One	Two	Three	Four	Five	Six
One Wage Earner in Household	2,900 Minimum Exemption	4,000 Minimum Exemption	5,200 Minimum Exemption	6,000 Minimum Exemption	6,850 Minimum Exemption	7,700 Minimum Exemption
Two Wage Earners in Household		4,850 Minimum Exemption	6,050 Minimum Exemption	6,850 Minimum Exemption	7,700 Minimum Exemption	8,550 Minimum Exemption

Such minimum exemptions shall be increased by $850 for each member of a family household in excess of six, who is dependent on the income of such members.

18 NYCRR § 360.5 provides:

360.5 Determination of net available income and utilization of any excess. [Additional statutory authority: Social Services Law, §§ 131-h, 363-a, 364, 365-a, 365-b, 366] (a) In determining the net available income of an individual or a family household, the following verified items shall be deducted from gross income:

(1) income taxes;

(2) health insurance premiums;

(3) payments for support of dependents required to be made pursuant to court order; and

(4) social security withholding taxes.

(b) The available net income shall be compared with the income exemptions for such individual or family to determine the excess, if any, which may be utilized to meet all or part of the cost of medical care and services of such individual or family.

(c) For an applicant, who, if needy, would be eligible for SSI, ADC, or HR, the following income and resources that are required to be or may be disregarded or set aside for his future needs in the category for which he would be eligible, shall not be considered as being available when applying the criteria for establishing his financial eligibility for medical assistance.

(1) *Generally.* Those exemptons and disregards of miscellaneous income and resources contained in section 352.22 of this Title.

(2) *Additional income exemptions and disregards for SSI-related applicants or recipients:*

(i) The first $20 of any unearned or earned income shall be disregarded. Only one $20 disregard is permitted per couple.

(ii) The first $65 plus one-half of the remainder of gross earned income shall also be disregarded.

(iii) Any refund received from a public agency from taxes paid on real estate or food purchases.

(iv) Assistance based on need—regular cash assistance payments based on need and furnished by a State or political subdivision in supplementation of income.

Appendix "G"

(v) Educational grants. Any portion of a grant, scholarship or fellowship received for use for tuition and fees at any educational institution.

(vi) Student/child earned income. Any income earned by a child under age 22 who is regularly attending a school, college, university or course or vocational or technical training up to $1,200 per calendar quarter with an overall limit of $1,620 per calendar year.

(vii) Infrequent or irregular income. Income received to infrequently or irregularly to be included if the totals do not exceed:

(*a*) $20 of unearned income per month, and

(*b*) $10 of earned income per month.

(ix) In addition to the disregard of the first $65 per month of earned income and one-half of the remainder, there shall also be exempted from the earned income of an individual who has been determined to be blind under applicable standards, the amount of any expenses reasonably attributable to the earning of any income.

(3) *Additional income exemptions and disregards for families and children.* All of the earned income of a minor child who is attending school either full time or part time and not employed full time, shall be exempt in determining eligibility for medical assistance.

(i) *School attendance* means attending a school, college or university or a course of vocational or technical training designed to fit a person for gainful employment or participation in the Job Corps under the Economic Opportunity Act;

Appendix "G"

(ii) *Part time school attendance* means a school schedule equal to at least one-half of a full time curriculum as determined by the educational authority:

(iii) *Full time employment* means substantial work activity equal to or exceeding 30 hours per week.

(4) *For applicants/recipients in chronic care.*

(i) Moneys received by an applicant/recipient relative to the deprivation of a right or benefit shall be disregarded in determining eligibility for medical assistance providing:

(*a*) The money received is the result of a legal action against the chronic care facility due to improper or inadequate treatment;

(*b*) The money is received after September 1, 1975.

(ii) All other disregards may be applied towards the cost of medical care received in a chronic care facility.

(d) (1) If an applicant or recipient is not receiving chronic care in a medical institution, all resources in excess of those exempt from consideration in accordance with paragraph (a) of subdivision 2 of section 366 of the Social Services Law and contributions in excess $1,080 annually made to a family household by a person other than a member of such family household who resides therein shall be utilized to meet the cost of medical assistance for such applicant or recipient and other members of his family household.

(2) The income of such applicant or recipient shall be utilized in the following manner:

(i) for inpatient hospital care, only the excess income for a period of six months shall be considered as

available for payment; if the income of the applicant or recipient increases or decreases during the six-month period, his obligation for payment shall be altered accordingly;

(ii) for prosthetic appliances, including dentures, only the excess income for a period of six months shall be considered as available for payment; if the income of the applicant or recipient increases or decreases during the six-month period; his obligation for payment shall be altered accordingly;

(iii) for other medical care and services outside a medical institution, only the excess income for the month or months in which care or services are given shall be considered as available for payment.

(e) If an applicant or recipient is receiving chronic care in a medical institution or intermediate care facility, all resources in excess of those exempt from consideration in accordance with paragraph (a) of subdivision 2 of section 366 of the Social Services Law and $28.50 per month for personal expenses shall be utilized to meet the cost of medical assistance for that applicant or recipient and for maintenance needs of the dependent members of his former family household. For the purpose of this subdivision and subparagraph (8) of paragraph (a) of subdivision 2 of section 366 of the Social Services Law, when a person is in chronic care, he shall not be deemed to be a member of any household except, that for the purpose of determining the amount of the savings exemption for his former family household, he shall be considered a member thereof. All non-exempt income of such an applicant or recipient be utilized in the following order:

(1) to meet the maintenance needs of the dependent members of his former family household, less any

amount of income in cash or in kind possessed by such dependent members in accordance with the following schedule:

SCHEDULE MA-2

Number of Family Members in Household Dependent on Income

One	*Two*	*Three*	*Four*	*Five*	*Six*	*Seven*
$2,800	$4,000	$4,200	$5,000	$5,800	$6,500	$7,400

* For each additional person in excess of seven in the household, add $700.

(2) the balance, if any, to meet the cost of his medical assistance.

(f) In making a determination of net income and amounts and excess income which may be utilized to meet all or part of the medical care and services of an individual who, or a family household which, receives a fixed annual salary, which is paid in a lump sum or over a period of time which is less than the annual period, such fixed annual salary shall be divided by 12 in order to determine net available monthly income for the annual period covered by such salary.

(g) In determining the net available income of a family household in which there is a pregnant woman, such family household shall be considered as increased by one person from the fourth month of pregnancy which has been medically verified.

(h) In determining the net available income of a person or family household maintenance in kind contributed by persons other than legally responsible relatives shall not be considered, except when that maintenance is furnished to a person or family household as a part of compensation

for services rendered. In such cases, the value of that maintenance shall be computed as follows:

(1) Housing for a household composed of one person, occupying one room, shall be computed at $12 per month. In all other cases, the rates for housing shall be based on rents for comparable housing in the community.

(2) Board shall be computed at a monthly rate per person of $43, or, if fewer than three meals per day are provided, at $10.75 for breakfast, $12.90 for lunch, and $19.35 for dinner.

(i) A person who, but for his attendance at a school or college, would be living in the family household of a legally responsible relative who is providing his maintenance away from home, shall be considered a member of that household.

No. 77-1207

In the Supreme Court of the United States

OCTOBER TERM, 1977

BARBARA B. BLUM, ACTING COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES AND GABRIEL R. RUSSO, COMMISSIONER OF THE MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONERS

v.

MARTIN TOOMEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

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This brief is filed in response to the Court's invitation of April 3, 1978.

QUESTION PRESENTED

As part of its procedures for implementing its Medical Assistance ("Medicaid") program, estab-

lished by Title XIX of the Social Security Act, 42 U.S.C. (and Supp. V) 1396 *et seq.*, the State of New York does not exempt actual work-related expenses from the applicant's income for purposes of determining his eligibility for and level of medicaid assistance; rather New York exempts a standard amount from each applicant's income. In computing income when determining eligibility for its program of Aid to Families with Dependent Children under Title IV of the Act, 49 Stat. 627, as amended, 42 U.S.C. (and Supp. V) 601 *et seq.*, however, New York does exempt actual work-related expenses.

The United States will discuss the question whether this aspect of New York's method of determining eligibility for and extent of medicaid assistance conflicts with Title XIX of the Social Security Act and the implementing regulations promulgated by the Department of Health, Education, and Welfare.[1]

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[1] Petitioners' principal contention (Pet. 5-7) is that the district court lacked pendent jurisdiction over respondent's statutory claims; petitioners rely primarily on *Hagans* v. *Lavine*, 415 U.S. 528. In our view the lower courts properly assumed jurisdiction. *Hagans* establishes that district courts have pendent jurisdiction under 28 U.S.C. 1343(3) of federal statutory claims if the constitutional claim to which they are pendent is " 'patently without merit,' " or not "insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit * * *." 415 U.S. at 542-543. None of the reasons or authorities cited by petitioners (Pet. 5-6) establishes or suggests that respondents' equal protection claims are so implausible or completely devoid of merit that the district court would lack jurisdiction over them. Because the court of appeals properly applied the *Hagans* principle, there is no need to hold the petition here

STATEMENT

1. Title XIX of the Social Security Act, as added, 79 Stat. 343, and amended, 42 U.S.C. (and Supp. V) 1396 *et seq.*, creates a Medical Assistance program, commonly known as "medicaid," pursuant to which the states, with federal funds, may reimburse the costs of medical treatment provided (1) to the "categorically needy" (*i.e.*, those persons who receive payments under the cash assistance programs of the Social Security Act, such as the Aid to Families with Dependent Children Program (AFDC)),[2] and (2), if a participating state so chooses, to the "medically needy" (*i.e.*, those individuals, otherwise eligible for categorical assistance, whose income and resources make them ineligible for categorical assistance but whose income and resource are still insufficient to cover the costs of necessary medical care and services). 42 U.S.C. (Supp. V) 1396a(a)(10)(A) and

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pending the Court's decision in *Chapman* v. *Houston Welfare Rights Organization*, No. 77-719, certiorari granted, February 21, 1978, and *Gonzalez* v. *Young*, No. 77-5324, certiorari granted, February 21, 1978, which present the question whether federal courts have jurisdiction of controversies similar to the present one under 28 U.S.C. 1343(3) or (4) in the absence of a colorable constitutional claim.

[2] The present categorical assistance programs are AFDC (Title IV of the Act, 42 U.S.C. (and Supp. V) 601 *et seq.*), the Supplemental Security Income (SSI) program (Title XVI of the Act, 42 U.S.C. (and Supp. V) 1381 *et seq.*), and (in Guam, Puerto Rico and the Virgin Islands) the programs of aid to the aged, blind, and disabled (Titles I, X, XIV, and XVI of the Act, 42 U.S.C. (and Supp. V) 301 *et seq.*, 1201 *et seq.*, 1351 *et seq.*, and 1381 *et seq.*).

(C); 42 C.F.R. 448.1(a)(1) and (2). A "medically needy" person who, but for his income, would be eligible for AFDC assistance is referred to as "AFDC-related." Respondents are AFDC-related persons.

New York is one of the states participating in Title XIX that has chosen to extend medicaid coverage to the medically needy (see N.Y. Social Services Law (N.Y.S.S.L. § 366(1) (McKinney 1978).

States offering medicaid coverage to the medically needy are accorded a range of discretion in fixing the amount of income an assisted family may retain to meet normal living expenses.[3] The statute and implementing regulations require, however, that the state must consider, in fixing the amount of income that may be retained by the AFDC-related medically needy, "all disregards applicable to income * * * which are utilized when determining eligibility * * * under the State's approved title IV-A [AFDC] plan." 42 C.F.R. 448.3(c)(3)(i).[4] See also 42 U.S.C. (Supp. V) 1396a(a)(17). In other words, if a state disregards a person's expenses in commuting to work in determining eligibility for and extent of AFDC payments, it must disregard the same kind of expenses

[3] To qualify for federal matching funds, the state may set that amount at not more than 133 1/3 percent of the state's highest AFDC payment for a family of the same size without income or resources (42 U.S.C. 1396b(f)(1)(B)(i)), and at not less than "the higher of the levels of the payment standards generally used as a measure of financial eligibility in the [categorical assistance] programs." 42 C.F.R. 448.3(c)(1)(ii).

[4] Formerly codified at 45 C.F.R. 248.3 (1976) and recodified effective October 1, 1977 as 42 C.F.R. 448.3 (42 Fed. Reg. 52826-52827).

in determining eligibility for and extent of "medically needy" payments.[5]

2. New York disregards actual expenses incident to employment in computing gross earnings of AFDC recipients for purposes of determining the level of payment to which they are entitled. N.Y.S.S.L. § 131-i (McKinney 1978); 18 N.Y.C.R.R. 352.19. This deduction from gross income of expenses reasonably attributable to the earning of income is required by 42 U.S.C. 602(a)(7), as this Court held in *Shea* v. *Vialpando*, 416 U.S. 251.

For the medically needy, however, New York allows no such deduction. It has established a schedule of standard income exemptions; the exemptions vary only according to the size of the household. N.Y.S.S.L. § 366(2)(a)(8) (McKinney Cum. Supp. 1978); 18 N.Y.C.R.R. 360.5. The existence and extent of actual work-related expenses incurred by members of a medically-needy household are not considered.[6]

[5] A recipient's eligibility for either AFDC or medical assistance and the level of a recipient's assistance are related. For example, if a person is not eligible for assistance under a given program unless his income (after deducting various "disregards") is $5000 or less, the amount of the payments he is entitled to receive will depend on the amount by which his income is less than $5000.

[6] 18 N.Y.C.R.R. 360.5(c)(2)(ix) does provide for disregarding work-related expenses of blind SSI-related medically needy persons. The fact that the named plaintiffs were both AFDC-related and relied on 42 C.F.R. 448.3(c)(3)(i) suggests that relief may have been sought only on behalf of the AFDC-related medically needy. (Petitioners have not, however, challenged in this Court the particulars of the class certification, and the class certified by the district court consists of all "medically needy" persons. Pet. App. 8a.)

Respondents instituted this action for declaratory, injunctive, and monetary relief in the United States District Court for the Northern District of New York, contending that New York's statutes and regulations setting eligibility for and the amount of medicaid assistance to the medically needy conflict with the Equal Protection Clause of the Fourteenth Amendment, Title XIX of the Social Security Act, and federal regulations under the medicaid program.

Finding that a colorable constitutional question had been presented, the district court assumed pendent jurisdiction over respondents' statutory claims (Pet. App. 14a). The court held that N.Y.S.S.L. § 366(2) (McKinney 1978) and 18 N.Y.C.R.R. 360.5(a) "conflict with the Social Security Act and regulations issued thereunder insofar as they do not provide the same disregards or deductions from gross income of all work-related expenses for medically needy as are used to determine eligibility for or the amount of said benefits for AFDC" (Pet. App. 8a). The court of appeals affirmed (Pet. App. 1a-5a), relying on "the requirement of subsections (10)(C)(i) and (17)(B) of 42 U.S.C. § 1396a(a) that the 'medically needy' be treated the same as AFDC applicants with respect to income disregarded for purposes of ascertaining eligibility" (*id.* at 4a). Neither the district court nor the court of appeals reached respondents' constitutional claims.

DISCUSSION

1. New York's statutes, which disregard actual work-related expenses in determining eligibility for,

and payment levels to AFDC recipients but do not disregard the same expenses for determining eligibility for and payment levels to medically needy recipients, are contrary to 42 U.S.C. (Supp. V) 1396a (a)(17), which provides in pertinent part:

> (a) A State plan for medical assistance must—
>
> * * * * *
>
> (17) include reasonable standards * * * for determining eligibility for and the extent of medical assistance under the plan which * * * provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient and (in the case of any applicant or recipient who would, except for income and resources, be eligible for [categorical assistance]) as would not be disregarded * * * in determining his eligibility for such [categorical assistance] * * *.

Regulations promulgated under the statute establish the same requirement. 42 C.F.R. 448.3(c)(3) provides in pertinent part (emphasis supplied):

> [W]hen establishing eligibility the State plan must provide for:
>
> (i) * * * consideration of *all* disregards applicable to income and resources which are utilized when determining eligibility * * * under the State's approved [AFDC] plan.

The statute and regulations thus both require state plans to "provide for taking into account only such income and resources * * * as would not be disregarded * * * in determining [the recipient's] eligi-

bility for such [categorical assistance]." In determining eligibility and assistance levels for the medically needy the states therefore must disregard the same items of income that it disregards in determining eligibility and assistance levels for AFDC recipients —including, as in this case, disregards for actual work-related expenses.

The equal deduction requirement reflects a basic purpose of the Medical Assistance program, which was designed to help the working poor *avoid* the necessity of living below a subsistence level because of medical bills. As the Senate Finance Committee stated in recommending adoption of the "spend-down" provision in Title XIX, which allows a person to qualify for medicaid coverage if his payment of medical expenses would reduce his income to the medically needy level[7] (S. Rep. No. 404, 89th Cong., 1st Sess. Pt. 1, p. 79 (1965)):

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[7] 42 U.S.C. (Supp. V) 1396a(a)(17) also provides in part that a state plan must

> provide for flexibility in the application of such standards with respect to income by taking into account, except to the extent prescribed by the Secretary, the costs (whether in the form of insurance premiums or otherwise) incurred for medical care or for any other type of remedial care recognized under State law * * *.

After all appropriate factors have been subtracted, an applicant's income is measured against the participating state's medically needy minimum income level. Those applicants whose countable income is below the medically needy level are automatically eligible for medicaid assistance. Those with countable income above the medically needy level must "spend-down" to establish eligibility, *i.e.*, they must incur medical

> In no event * * * may a State require the use of income or resources which would bring the individual's income below the amount established as the test of eligibility under the State plan. Such action would reduce the individual below the level determined by the State as necessary for his maintenance.

The Secretary's regulations (42 C.F.R. 448.3) accordingly require state medicaid plans to set the minimum amount that the medically needy may retain for normal living expenses at a figure equal to or above the most liberal payment standard generally used in the state's categorical assistance programs (Subsection 448.3(c)(1)(ii)). Subsection 448.3(c)(2) establishes a flexible measurement of available income and subsection 448.3(c)(3)(i) further requires that state plans give the AFDC-related medically needy the advantage of all income disregards that the state uses in determining eligibility under the state's AFDC program. Finally, subsection 448.3(b)(1) requires that a state plan provide only for the consideration of income that is "actually available." In other words, under the regulations, a state may never require a person to become more needy than the categorically needy in order to receive aid under Title XIX.

New York's system poses the very danger that the statute and regulations were designed to avoid. Suppose a state provided that families would be eligible

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expenses in an amount equal to their excess income. 42 C.F.R. 448.3(c)(2); 42 C.F.R. 448.4(b)(5). Any additional medical expenses are absorbed by medicaid.

for AFDC assistance if their income (excluding all disregards) was $5,000 or less and provided that actual work-related expenses would be disregarded. A family with $6,000 in income but $2,000 in work-related expenses would be entitled to assistance; under the state's rules, the $2,000 would be disregarded, and the net income of $4,000 (deemed by the state to be insufficient for subsistence) would be lower than the maximum for eligibility. But if, as the state statute permits, a state also established $5,000 as the qualifying figure for medicaid assistance, but did not, for medicaid purposes, disregard actual work-related expenses, a family could be forced to subsist on less than what the state had determined is necessary for subsistence. Under such a system a family with a $10,000 income, $5,000 in medical bills and $2,000 in work-related expenses would be entitled to no medicaid assistance, notwithstanding that it had only $3,000 of available income. New York's plan does not produce such an extreme result, because it disregards a standard amount for all persons. But because the state disregards a standard amount rather than actual, work-related expenses to compute eligibility, it allows any person whose actual work expenses exceed the standard to fall below the subsistence level.

None of the reasons offered by petitioners justifies this anomalous result. Petitioners' argument that New York's standard exemption system is "reasonable" within the meaning of 42 U.S.C. (Supp. V) 1396a(a)(17) is irrelevant. See, *e.g.*, *Aitchison* v. *Berger*, 404 F. Supp. 1137 (S.D. N.Y.), affirmed, 538

F. 2d 307 (C.A. 2), certiorari denied, 429 U.S. 890, in which the court rejected the same argument by New York and invalidated the State's system of disregarding actual shelter costs for AFDC purposes but disregarding only a standard shelter allowance for medicaid purposes. The statute requires *both* "reasonableness" *and* that the state take into account for the medically needy the same resources that it takes into account for the categorically needy (see page 7, *supra*). New York's program makes no attempt to meet the latter requirement. Furthermore, New York's income exemption system conflicts with 42 C.F.R. 448.3(b)(1) and (c)(1)(ii) because it requires some medically needy persons to spend down below the level of payments to similarly situated recipients of categorical assistance.[8]

Petitioners' reliance on *Rosado* v. *Wyman*, 397 U.S. 397, for the proposition that work-related expenses may be averaged (Pet. 9-10) is unfounded. In *Shea* v. *Vialpando*, *supra*, this Court rejected the same argument in holding that a state's use of a standard exemption for work-related expenses for purposes of determining AFDC assistance conflicted with the ex-

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[8] There is no merit to petitioners' claim (Pet. 7-9) that the standard exemption approximates actual work expenses. Petitioners cite (Pet. 8) N.Y.S.S.L. § 366 (McKinney 1968) and implementing regulations to show that the state's system is designed to "make allowance for the number of wage earners in a household", but petitioners overlook the fact that that provision has been repealed. See McKinney's 1968 Session Laws of New York, c. 32, § 1. The current § 366 (see Pet. App. 56a), provides a schedule of standard exemptions that are unrelated to the number of wage earners in the household.

press provisions of 42 U.S.C. 602(a)(7). The Court stated (416 U.S. at 265 n. 13): "*Rosado* * * * was in no sense intended as a blanket approval of the principle of averaging under AFDC programs without regard to what is being averaged."

2. New York's program is atypical. No more than a few other states derive their medically needy eligibility standards by using standard deductions for items that are treated and deducted on an actual cost basis in categorical assistance cases. Consequently, we believe that the problem illustrated by this case is not widespread and can be handled by the Secretary through negotiation with the participating states or, if necessary, by disapproval of state plans. See 42 U.S.C. 1396a(b). The decision of the court of appeals is correct. It is consistent with the holding of other federal courts on related questions[9] and with the holding of two New York State court decisions involving the precise issue involved here. *Newborn* v. *Toia*, 89 Misc. 2d 409, 391 N.Y.S. 2d 786 (Sup. Ct.); *Sennett* v. *Shang*, No. 362-78, decided March 2, 1978 (Sullivan Cty. Sup. Ct.).[10] There is, therefore, no reason for review by this Court.

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[9] See *Aitchison* v. *Berger*, *supra*; *Dominguez* v. *Milliken*, CCH Medicare and Medicaid Guide ¶ 26,633 (W.D. Mich.); *Schaak* v. *Schmidt*, 344 F. Supp. 99 (E.D. Wisc.); *Wilczynski* v. *Harder*, 323 F. Supp. 509 (D. Conn.); *Dumbleton* v. *Reed*, 40 N.Y. 2d 586, 388 N.Y.S. 2d 893, 357 N.E. 2d 363; *Wong* v. *Brian*, CCH Medicare and Medicaid Guide ¶ 26,605 (Cal. Ct. App.).

[10] *Sennett* cites and follows the court of appeals' decision in the present case. *Newborn* was decided before the court of appeals' decision here (see Pet. App. 4a n. 4).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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